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SHORT TITLE: [Goeke, Supt., Renz CC]
VERSUS [Branch, Lynda] DATE DOCKETED: [111694]
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	DATE	NOTE	PROCEEDINGS & ORDERS
1	Nov 16 1994	G	Petition for writ of certiorari filed.
2	Nov 16 1994		Appendix of petitioner filed.
4	Dec 4 1994		Order extending time to file response to petition until January 16, 1995.
6	Jan 13 1995		Brief of respondent Lynda Ruth Branch in opposition filed.
5	Jan 18 1995		DISTRIBUTED. February 17, 1995 (Page 17)
8	Feb 21 1995		REDISTRIBUTED. February 24, 1995 (Page 14)
10	Feb 27 1995		REDISTRIBUTED. March 3, 1995 (Page 12)
12	Mar 13 1995		REDISTRIBUTED. March 17, 1995 (Page 27)
13	Mar 20 1995		Petition GRANTED. Judgment REVERSED. Opinion per curiam.

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(1) No. 94-898 NOV 16 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRYAN GOEKE,
Superintendent, Renz Correctional Center

Petitioner,

v.

LYNDA RUTH BRANCH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

I.

Whether a new rule of law, that "substantive due process" prohibits a state appellate court from dismissing an appeal pursuant to the escape rule, can be applied retroactively in federal habeas corpus.

II.

Whether a state appellate court violates "substantive due process" in dismissing the appeal of a convicted felon who absconded before sentencing.

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Petitioner, Superintendent Bryan Goeke,[1] prays the Court for its order granting a writ of certiorari to review the judgment of the court below granting Respondent Branch's application for a writ of habeas corpus.

Opinions Below

The September 21, 1994, majority opinion of the United States Court of Appeals for the Eighth Circuit concerning which Superintendent Goeke seeks this Court's review, as well as the dissenting opinion of Judge Bowman (joined by Judges Beam, Loken, and Hansen), are available on WESTLAW at 1994 WL 513661, and on LEXIS at 1994 U.S. App. LEXIS

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[1]As Superintendent of the Renz Correctional Center, where Branch has been incarcerated throughout the proceedings in the lower courts, Bryan Goeke was the proper party respondent within the meaning of 28 U.S.C. § 2254, Rule 2(a). See App. 94.

26584. App. 1-16. These modified opinions replace the published opinions of June 28, 1994, reported at 27 F.3d 1334 (8th Cir. 1994). App. 27-41. The opinion of the district court is unreported. App. 17-26.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Eighth Circuit was initially entered on June 28, 1994. Over the dissenting opinions of four (4) of its members, the court of appeals en banc denied rehearing on September 21, 1994. The panel also denied rehearing, and issued revised opinions–majority and dissenting–on September 21, 1994. Superintendent Goeke invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Section 1 of the fourteenth amendment to the Constitution of the United States provides, to the extent it has been invoked in the court of appeals, that: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (a) of 28 U.S.C. § 2254 provides, in relevant part, that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Statement of the Case

Lynda Ruth Branch was charged in the Circuit Court of Cole County, Missouri, with having fatally shot her husband. The court ordered a change of venue to Cape Girardeau County. In October 1986 a jury found Branch guilty of murder in the first degree, Mo. Rev. Stat. § 565.020 (1986).

After a reversal and remand, State v. Branch, 757 S.W.2d 595 (Mo. Ct. App. 1988), and another change of venue, a jury in the Circuit Court of Boone County convicted Branch of first-degree murder for a second time on March 3, 1989. App. 44-46. The jury assessed her punishment as life imprisonment without eligibility for probation or parole. App. 44. The court continued Branch's bond; it set the case for disposition of Branch's motion for new trial, and presumably also for sentencing, for April 3, 1989. App. 47-48.

On that date Branch did not appear. App. 48-49. The prosecutor moved for bond forfeiture; the trial court granted the motion and set a hearing for rendition of judgment on the bond for May 1, 1989. App. 50. The trial court issued a capias warrant for Branch's arrest; it ordered that on her arrest she be held without bond. App. 53.

On April 6, 1989, law enforcement officers arrested Branch in Moniteau County, Missouri; officers returned her to the Circuit Court of Boone County. On April 10, 1989, the trial court held a sentencing hearing. App. 76; State v. Branch, 811 S.W.2d 11, 11 (Mo. Ct. App. 1991). The trial judge asked Branch if there was "any statement which [she wished] to make to the Court prior to imposing judgment and sentence." Concerning her failure to appear, she responded as follows:

> First and foremost I apologize for not appearing on the 3rd. My actions were just due to my confusion and my extreme emotional distress. The sentence the jury recommended was just beyond my comprehension.

Branch went on to make arguments against her conviction. App. 56-57. The trial court sentenced Branch in accordance with the verdict. App. 57.

Branch filed an appeal of the judgment and sentence against her. She also filed an action for post-conviction relief pursuant to Mo. S. Ct. R. 29.15. As required by subdivision (*l*) of Rule 29.15, the Missouri Court of Appeals held her direct appeal in abeyance while she litigated her post-conviction relief action. After an evidentiary hearing, the motion court denied relief on the merits. App. 62-74. Branch appealed that disposition as well. As provided by subdivision (*l*), her direct appeal and the appeal of the motion court's denial of post-conviction relief were consolidated.

The State moved to dismiss Branch's appeal on the basis of the escape rule. The Missouri Court of Appeals took the State's motion with the case, and the parties proceeded to submit briefs on the merits. After oral argument, the court dismissed Branch's consolidated appeal on the procedural basis the State had advocated, i.e., the escape rule. App. 76-78, 811 S.W.2d at 12.

Invoking 28 U.S.C. § 2254, Branch filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri. Through counsel, she raised sixteen (16) asserted grounds for relief. App. 79-92. For her first ground, Branch argued that the dismissal of her consolidated appeal denied her due process of law and the equal protection of the laws (1) because her failure to appear for sentencing was not an "escape"; (2) because she had been in custody at the time of her appeals; (3) because neither the State nor the courts had been prejudiced or delayed by her failure to appear; and (4) because she had been denied a fair trial, in that her motion for new trial and the order denying her motion for post-conviction relief had never been reviewed on the merits by an appellate court. App. 84-85.

Superintendent Goeke responded that Missouri's escape rule applied to Branch's conduct, and argued that this Court and other federal courts had approved of the escape rule. App. 97-99. He argued that if the district court were to hold that the

state court's application of the escape rule was unconstitutional, it could not enforce this rule in the pending case consistently with Teague v. Lane, 489 U.S. 288 (1989). App. 99-100. Goeke invoked the procedural default arising from Branch's escape as barring consideration of her remaining asserted grounds for relief. App. 100-04.

After receiving a traverse from Branch, the district court denied relief. App. 17-26. It held that Branch had a state-created right to a direct appeal which the State could not take away without due process of law. App. 21. It quoted this Court's opinion in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), as providing the analysis to be applied in deciding whether the deprivation was without due process. App. 22. Employing this "procedural due process analysis," the district court found that the right to a direct appeal was "important," and the risk of erroneous deprivation of this right was "substantial," but also found that "the burden on Missouri to provide a hearing on the reason why [Branch] did not comply with a court order is minimal," because the State has "a substantial interest in encouraging obedience to procedural rules and court orders." Because "the record shows that [Branch's] absence was not due to events beyond her control, but merely to her confusion and unwillingness to accept the verdict," her "right to due process was not violated . . . ." App. 23.[2]

Citing Eighth Circuit precedent–Buckley v. Lockhart, 892 F.2d 715, 718 (8th Cir. 1989), cert. denied, 497 U.S. 1006 (1990)–the district court agreed that Branch's escape was a procedural default barring consideration of her other asserted grounds for relief. Because it found that she had not shown

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[2]The district court analyzed the petitioner's equal protection claim in light of San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). It held that because the petitioner had failed to allege membership in a "suspect class" or violation of a "fundamental right," the action of the Missouri Court of Appeals was subject to scrutiny only under the "rational basis" test. The district court held that the rationales which Missouri courts had given for enforcing the escape rule reflected "legitimate state interests," and that the escape rule "rationally further[ed] these interests." App. 24-25.

"cause" for her failure to appear, it enforced the default. App. 25-26.

The district court announced its judgment on September 23, 1992. App. 26. When Branch sought to appeal, the district court denied her motion for certificate of probable cause to appeal. The United States Court of Appeals for the Eighth Circuit treated her notice of appeal as an application for certificate of probable cause, and granted it on February 5, 1993.

On March 8, 1993, this Court announced its judgment in Ortega-Rodriguez v. United States, 113 S.Ct. 1199 (1993). Branch filed her brief on May 7, 1993, presenting one point on appeal: that "the Missouri Court of Appeals [had] violated her constitutional right to due process of law when it summarily dismissed her consolidated appeals based on the 'escape rule', in that the blanket application of the 'escape rule' was arbitrary and irrational because the court failed to consider that [she] had not yet initiated the appellate process . . . nor did her actions burden or delay the normal appellate process." App. 106.

Petitioner relied on Ortega-Rodriguez, arguing that the Missouri appellate court's handling of her appeal "clearly and directly conflicts with the principles announced in the recent opinion of the United States Supreme Court in Ortega-Rodriguez v. United States . . . ," and that in order to be valid, the escape rule "involves a fact-specific inquiry and recognizes discretionary application." App. 110. Branch quoted Mathews v. Eldridge as "set[ting] out the appropriate procedural due process analysis," but disagreed with the district court's application of this standard. App. 113. She argued that "[i]n light of the Ortega-Rodriguez case . . . the District Court erroneously held that [her] due process rights were not violated," because she had yet to invoke the appellate process when she failed to appear for sentencing, and her failure to appear did not delay the processing of her appeals. App. 114.

Superintendent Goeke responded that Ortega-Rodriguez did not apply to Branch's case, because it dealt with the "escape" or "fugitive dismissal" rule internal to the federal judiciary, and because it was decided under this Court's

supervisory power over the lower federal courts rather than as a constitutional question. Goeke argued that for these reasons, Branch's argument on appeal failed to justify relief in federal habeas corpus, because any assumed inconsistency with the rule of Ortega-Rodriguez would not violate the Constitution, laws, or treaties of the United States. App. 119-20. Goeke added:

> If this Court were to disagree, and believe that Ortega-Rodriguez was a constitutional rule, such a conclusion could not be enforced in this collateral-attack proceeding consistently with the principles set forth in Teague v. Lane, 489 U.S. 288, 299-316 (1989)(plurality opinion), and its progeny. See Doc. No. 3 at 7-8 [App. 99-100].

App. 129 n.5.

At oral argument, members of the panel phrased the issue before them as one of "substantive due process," and the respective counsel responded. App. 136-37, 147-49, 150-54 & 157-60.

On June 28, 1994, the court of appeals issued an opinion in this case, reasoning that "[t]he Due Process Clause contains a substantive component that protects individuals from government action that is arbitrary . . . , conscience-shocking . . . , oppressive in a constitutional sense . . . , or interferes with fundamental rights . . . ," and that the application of the escape rule to Branch violated this "substantive component" because it was "based on nothing more than [her] failure to appear as ordered for sentencing . . . ." App. 31 & 34 (citations omitted). At no point did the majority address the principle of non-retroactivity announced by this Court in Teague v. Lane and raised by Superintendent Goeke in his response to show cause, in his brief, and at oral argument. App. 27-34.

Judge Bowman dissented, pointing out that Branch had not clearly presented the substantive due process issue:

> It is not altogether clear to me that Branch's broad assertion of a due process violation, as set forth in her petition for the writ, properly raised the substantive due process issue in the District Court. It was not a subject of discussion in the court's denial of the writ. Moreover, the argument Branch makes in her brief is a procedural due process argument. See Brief of Appellant at 10-12. It was not until prodded by this Court at oral argument that counsel for Branch acknowledged he was advancing an argument based on substantive due process.

App. 35 n.1. Judge Bowman disagreed with the majority's resort to substantive due process, and argued that the Missouri Court of Appeals had not violated Branch's due process rights because there was no "fundamental right" to a criminal appeal. App. 37. He argued that this sanction did not "shock the conscience," because Branch was already subject to life imprisonment, and an additional sentence for escape from confinement would be an "indiscernibl[e]" deterrent. App. 37-38. Judge Bowman distinguished Ortega-Rodriguez, observing that "[i]t is of no consequence to the constitutionality of state procedures that the United States Supreme Court has used its supervisory power to limit the scope of the federal common-law escape rule." App. 40.

Superintendent Goeke filed a suggestion for rehearing en banc. In it he pointed out that the panel had decided the case on a theory not presented to the district court or in Branch's brief; he raised the Teague issue once more; and he attacked the application of "substantive due process" doctrine to the facts before the court.

On September 21, 1994, the Eighth Circuit denied rehearing en banc; Judges Bowman, Beam, Loken, and Hansen would have granted rehearing. App. 42-43. The panel issued revised majority and dissenting opinions. App. 1-16.

In its revised opinion, the panel majority ruled that the State of Missouri had waived a non-retroactivity defense. App.

4-5. It acknowledged that Branch had not pleaded substantive due process in either the district court or in her brief, but that the case was acknowledged to concern substantive due process at oral argument. Stating that it would be "inconsistent with substantial justice" not to consider substantive due process, the majority "exercise[d its] discretion" to do so. App. 5-6.

On Superintendent Goeke's unopposed motion, the Eighth Circuit has stayed its mandate pending the filing of this timely petition.

Argument

I. The court below decided a question of federal law in a way that conflicts with this Court's decision in Teague v. Lane, and its progeny, in that the court below retroactively applied a new rule of law–that "substantive due process" prohibits a state appellate court from dismissing an appeal pursuant to the escape rule–in a federal habeas corpus proceeding.

In the district court, Branch raised general due process and equal protection challenges to the application of the escape rule, and Goeke invoked the principle of Teague v. Lane as a defense against these claims. App. 84-85 & 99-100. The district court denied relief, employing a procedural due process analysis. App. 20-23.[3]

In her brief in the Eighth Circuit, Branch criticized the reasoning and result of the district court, but employed the same procedural due process standard; she added an invocation of this Court's intervening decision in Ortega-Rodriguez v. United States. App. 106-16. In his brief, Goeke defended the district court's decision, and cited this Court's decision in Teague v. Lane in direct response to the argument Branch had made on appeal. App. 117-29 & n.5.

At oral argument, the panel brought up the doctrine of substantive due process as a possible ground for decision. App. 137. Counsel for Goeke invoked Teague as precluding relief under that theory as well. App. 150-58.

In its initial two-to-one opinion, the panel majority granted relief on its substantive due process theory, without any reference to Goeke's invocation of this Court's decision in Teague. App. 27-41. Goeke pointed out this omission in his suggestion for rehearing, which was denied with four (4) dissenting votes. App. 42-43. The panel issued modified opinions, in which the majority based its refusal to apply Teague on the premise that Goeke had waived it. App. 4-5.

[3]In rejecting Branch's equal protection argument, the district court held that Branch had not shown that the Missouri Court of Appeals had violated a "fundamental right." App. 24.

A. Teague precludes the relief the panel granted.

In Gilmore v. Taylor, 113 S.Ct. 2112 (1993), this Court provided the authoritative method by which a lower court should apply the non-retroactivity principle set forth in Teague. In Gilmore v. Taylor, the Seventh Circuit had rationalized its finding that it was not creating "new law" by saying that the Supreme Court had announced a due process right to proper jury instructions. Id. at 2117. This Court rejected such generalized analysis, and asked, instead, whether the proposed rule was "dictated" or "compelled" by Supreme Court precedent. Id. at 2116, 2117 (emphasis by this Court). If a court had to "stretch" Supreme Court precedent to reach the facts before it, then the rule of decision is "new law." See id. at 2118. An "expansive reading" of Supreme Court precedent constitutes "new law," this Court said, and when the prisoner invokes a line of cases at "too great" a "level of generality," the Teague principle requires the court to withhold relief. Id. at 2119, citing Saffle v. Parks, 494 U.S. 484, 491 (1990).

This Court's decision in Caspari v. Bohlen, 114 S.Ct. 948 (1994)("Bohlen"), emphasizes the duty of a federal court to "[s]urve[y] the legal landscape" as it existed on the date the prisoner's conviction and sentence became final. 114 S.Ct. at 953, quoting Graham v. Collins, 113 S.Ct. 892, 898 (1993). In making this survey, one looks primarily to decisions of this Court. Id. at 956.

When this Court's decisions are applied to the panel majority's theory for granting relief in the instant case, it is clear that in this case the panel majority announced a "new rule."

Neither at the time Branch's conviction and sentence became final, *nor even at the time of the panel majority's opinion*, had this Court laid down a rule–based on "substantive

due process" or any other theory said to be derived from the Constitution of the United States–forbidding *any* appellate court from dismissing a criminal defendant's appeal because he or she had escaped, absconded, or failed to appear before filing an appeal. It has not done so today.

Only *after* Branch's conviction and sentence had become final–in 1991, State v. Branch, 811 S.W.2d 11 (Mo. Ct. App. 1991)–did the United States Supreme Court announce its opinion in Ortega-Rodriguez v. United States. It was decided under this Court's *supervisory* capacity over the other federal courts. It disapproved the former rule of *one* circuit that *automatically* dismissed the appeals of federal criminal defendants who escaped before they had filed their appeals. Even the panel majority acknowledges (in a parenthetical note after a citation) that this decision was not based on the Constitution of the United States. App. 7.

Although Goeke denies that Ortega-Rodriguez applies to the instant case, he points out that the Missouri Court of Appeals did not "automatically" dismiss Branch's appeals. She had an opportunity to explain why she did not appear for sentencing; she availed herself of the opportunity. App. 56. She received a full evidentiary hearing on her motion for post-conviction relief; the motion court reached the merits irrespective of her absconding. App. 62-74. Both her direct appeal and her post-conviction relief appeal were briefed on the merits and orally argued. App. 76. Only after all of this process did the state appellate court apply the escape rule. Even if the Eighth Circuit had supervisory jurisdiction over the Missouri Court of Appeals, therefore, Ortega-Rodriguez would not have supported–let alone "dictated" or "compelled" its decision.

As the sole support for its statement that "there is no rational justification for a state appellate court to strip the defendant of the right to appeal" absent demonstrable empirical effects on the appellate process, the panel majority cites Woods v. Kemna, 13 F.3d 1244, 1246 (8th Cir. 1994). Slip op. at 6. First, in Woods, the Eighth Circuit remanded the cause in order for the prisoner to present his claim to the state courts in light

of Ortega-Rodriguez. Any language in the Woods opinion concerning substantive due process was therefore obiter dictum. Second, Woods was not announced until approximately three (3) years after Branch's appeal had become final. Third, an opinion from a federal court of appeals does not "dictate" or "compel" relief by a state court. Lockhart v. Fretwell, 113 S.Ct. 838, 846 (1993)(Thomas, J., concurring).

Whereas there was no authority forbidding the state courts from enforcing the escape rule against defendants who escape before filing an appeal, there were several decisions by this Court enforcing or approving of the escape rule generally, four (4) of which involve the states. Estelle v. Dorrough, 420 U.S. 534, 541-42 (1975)(per curiam); Molinaro v. New Jersey, 396 U.S. 365, 366 (1970)(per curiam); Allen v. Georgia, 166 U.S. 138 (1897); Bonahan v. Nebraska, 125 U.S. 692 (1887); Smith v. United States, 94 U.S. 97 (1876). The lack of Supreme Court precedent "dictating" or "compelling" the grant of relief based on substantive due process is evidenced by the panel majority's failure to identify such precedent, to identify any precedent from the federal appellate or district courts (other than the Eighth Circuit's own Woods dictum), to identify any precedent from a state appellate court or even a scholarly treatise or journal articulating the "substantive due process" theory. App. 6-8.

Whether or not the panel majority's opinion is a *logical* extension of other cases–such as Ortega-Rodriguez–it is nonetheless an *extension*. The result reached by the panel majority was not "compelled" or "dictated" at the time the Missouri Court of Appeals dismissed Branch's consolidated appeals.

Even if the panel majority's "substantive due process" theory were a justifiable exercise of federal judicial power–an issue to be discussed in the second part of this petition–it should not have been announced and enforced for the first time on federal collateral attack, but only by this Court on a writ of certiorari from the Missouri Court of Appeals's dismissal of Branch's consolidated state appeals.

B. Goeke did not waive Teague.

After Superintendent Goeke drew the lower court's attention to the fact that the panel had failed even to address the Teague issue, the panel sought to avoid it once more by asserting that "Missouri" had "waived" the issue. App. 4-5.

1. Whether Teague *can* be waived in the lower federal courts is a question of federal law on which the circuits are divided.

The panel majority's refusal to apply Teague depends *entirely* on its finding that Goeke waived this issue. When the refusal to apply one of this Court's decisions relies *entirely* on the concept of waiver, it is important to clarify whether the defense *can* be waived. On this issue there remains a conflict among the circuits. Consequently, this Court's grant of certiorari is needed to resolve this conflict. S. Ct. R. 10.1(a).

Although most courts that have spoken to the issue have held that a respondent in a federal habeas corpus action can waive the non-retroactivity principle of Teague to raising it too late in a habeas corpus action, the Fifth Circuit has found a split of circuits on the issue. Smith v. Black, 904 F.2d 950, 981 & n.12 (5th Cir. 1990), vacated on other grounds, 112 S.Ct. 1463 (1992), comparing Hill v. McMacklin, 893 F.2d 810, 823 (6th Cir. 1989), overruled on other grounds, Couch v. Jabe, 951 F.2d 94, 96 (6th Cir. 1991)(per curiam)(question of state-court reliance on procedural bar), with Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990), reaff'd in pertinent part, Hanrahan v. Thieret, 933 F.2d 1328, 1337 n.7 (7th Cir., cert. denied, 112 S.Ct. 446 (1991).[4]

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[4]Although the Seventh Circuit is one of the courts holding that a respondent can waive the non-retroactivity principle of Teague v. Lane, 489 U.S. 288 (1989), it has also held that even indirect, "abbreviated" invocations of Teague will defeat a claim of waiver, so long as they put the deciding court "on notice" of the issue. Daniel v. Peters, 1994 WL 574121

In Hill v. McMacklin, the Sixth Circuit considered the non-retroactivity principle in spite of the fact that the parties had not raised it. In Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir.)(en banc), cert. denied, 497 U.S. 1010 (1990), the Tenth Circuit held that in spite of a respondent's failure to raise a non-retroactivity defense *at all*, the court raised the issue "because the very scope of the writ of habeas corpus, and therefore our power to grant relief, is implicated."

The position of the Fifth, Sixth, and Tenth Circuits is superior to that of the Eighth and others because it distinguishes between defenses that exist solely to minimize the paperwork arising from civil litigation, on the one hand, and defenses of a constitutional dimension, on the other. Subject-matter jurisdiction falls into the latter category, in that a lower federal court does not have the power to decide a case unless that Congress has conferred that power on it. Teague falls somewhere in between, implicating both the *purpose* of federal habeas corpus review (and, hence, whether Congress intended for federal courts to entertain petitions on the merits under the circumstances of any given case) and convenience on the part of the respondent.

In Granberry v. Greer, 481 U.S. 129, 131, 133 (1987)(citing cases), this Court recognized that a respondent could waive the requirement of exhaustion of state remedies codified in 28 U.S.C. § 2254 (b) & (c), whether the omission to plead nonexhaustion is inadvertent or tactical. That decision rests on the premise that the exhaustion requirement exists to protect the states's interests in resolving constitutional issues in their own courts. In Granberry, however, this Court did not adopt a monolithic position that the respondent's counsel may *either* deny the state courts the protection of the exhaustion requirement, *or* "sandbag" by reserving the nonexhaustion defense until after a federal court has decided to grant relief. Instead, when the respondent does not raise the exhaustion issue, the federal court is under a duty to exercise *discretion*

(No. 92-2091)(8th Cir. Oct. 19, 1994)(per curiam).

whether to reach the exhaustion issue. Id. at 134-36. This Court set forth the considerations that should inform the exercise of that discretion; disagreement with the requirement itself was not one of them.

In respect to Teague, the question is whether the activity of applying new rules of constitutional law lies within the proper function of the federal courts, as this Court and the Congress conceive of that function, *whether or not the states would find that convenient*. Thus, it is–as the Tenth Circuit has held–closer to subject-matter jurisdiction, and is not so easily waived as the Eighth Circuit would have it.

It is one thing to say that Teague's principle of non-retroactivity is non-jurisdictional, in the sense that a federal court is not *bound* to inquire into it sua sponte. Caspari v. Bohlen, 114 S.Ct. at 953.[5] Goeke did not *expect* the Eighth Circuit to inquire into the non-retroactivity principle sua sponte. App. 99-100, 129 n.5, & 150-58. The question is whether some more demanding standard of pleading and proof may be required to have this Court's Teague decision followed than is required in respect to other legal rules.

This Court's decisions in Schiro v. Farley, 114 S.Ct. 783, 788-89 (1994); Godinez v. Moran, 113 S.Ct. 2680, 2685 n.8 (1993); Collins v. Youngblood, 497 U.S. 37, 40-41 (1990), have not obviated the conflict between the circuits to which Goeke refers. Cf. Caspari v. Bohlen, 114 S.Ct. at 952-53 (reaching Teague issue even though not expressly raised in petition for certiorari, because it a necessary predicate to the question presented).

In each of these cases, the party invoking Teague in this Court had not invoked it in the party's petition for certiorari or its brief in opposition. In light of this Court's limited and

[5]As a matter of principle, it is important to recall that *this Court* considered the non-retroactivity principle important enough to raise it sua sponte in the first place. Saffle v. Parks, 494 U.S. 484, 498 (1990)(Brennan, J., dissenting)(retroactivity issue not raised by respondent); Teague v. Lane, 489 U.S. at 390 (plurality opinion)(retroactivity issue raised only by amicus curiae).

discretionary jurisdiction, and the special requirements affirmatively (and prospectively) imposed on parties submitting briefs in opposition to certiorari (S. Ct. R. 15.1), these decisions do not dispose of the question whether an *inferior* federal appellate court, having *general* appellate jurisdiction over the district courts, may refuse to consider Teague *solely* because of the format in which it was presented.

2. Goeke raised and preserved the Teague issue throughout the proceedings below.

Assuming arguendo that a respondent in a federal habeas corpus action *can* waive Teague, Superintendent Goeke did not do so. Goeke asserted Teague generally when Branch made a general combined due process and equal protection claim in the district court. App. 99-100. He cited it in specific response to the argument that Ortega-Rodriguez applied to the states via the due process clause, when Branch made that argument in her brief before the Eighth Circuit. App. 129 n.5.

It is true that Superintendent Goeke did not *anticipate* the panel's substantive due process theory expressed for the first time at oral argument. As Judge Bowman observed (App. 10-11 n.1), however, Branch did not invoke "substantive due process" either in the district court or in her brief on appeal, and the district court did not address it. Instead, the *court* brought up substantive due process for the first time at oral argument. App. 137.

Branch's counsel stated the question on appeal as "whether imposing [dismissal as a sanction for escape] automatically rather than as a discretionary function was a proper use as it was applied to Lynda Branch in this matter." App. 131. He argued that "the primary case in this is the case of Ortega-Rodriguez . . . ." App. 132.

The court asked Branch's counsel, "what's the substantive component in due process that derails Missouri's reliance on expecting people to keep their time schedules as a matter of state law, and if they don't they lose their rights?"

Counsel responded that Missouri could do so, but that it needed to "show some connection with the appellate process" to employ the sanction which had been imposed on Branch. App. 136-37. A member of the court asked: "So . . . you're really making a substantive due process argument, a kind of fundamental right argument?" Branch's counsel answered: "That's correct." App. 137.

At the outset, counsel for Superintendent Goeke referred to the fact that Branch was asking the court to apply a rule of law "for the first time." App. 150. He observed that "the court has very ably confined this debate to one of substantive due process," and argued that *this* Court would not read Ortega-Rodriguez to state a constitutional rule. App. 151. He argued that the rule of decision under discussion would be a "new rule of law," and that "[c]onsequently, the prohibition of Teague against Lane on the enforcement of new rules of constitutional law for the first time in a collateral attack proceeding in federal court applies with full force to this case." App. 151-52.

Goeke's counsel pointed out that the Missouri Court of Appeals had taken the motion to dismiss with the case, and had enforced the escape rule only after the case had been briefed and orally argued. A member of the panel suggested that counsel for Branch had "concede[d] that there's no procedural due process issues involved here," and that "[i]t's a question of substantive due process . . . ." Counsel responded: "That's certainly -- that is the question as presented today, and it came out very clearly in petitioner's oral argument, and it's Teague barred." App. 153 (emphasis supplied). For the next four (4) appendix pages, members of the court and Goeke's counsel continued to discuss the Teague issue--in the specific context of the substantive due process theory raised at oral argument. App. 154-58.

In support of its assertion of waiver, the panel suggests the existence of a novel rule of appellate procedure, in which a party waives Teague by raising it in a footnote:

> Missouri [*sic* for 'Goeke'] waived Teague's nonretroactivity principle in responding to Branch's appeal. Missouri mentions the principle only twice in its brief. In the procedural history section, Missouri states that it raised the Teague principle in the district court. Missouri later mentions the principle in a one-sentence footnote buried on the last page of the state's lone argument--that the district court properly rejected Branch's due process claim on the merits. Missouri did not mention the nonretroactivity principle or cite Teague in its statement of the issues on appeal, and did not develop the Teague issue with supporting argument in its brief. Under these circumstances, Missouri waived our consideration of the Teague issue.

App. 5 (citing three court of appeals decisions, none of them involving Teague, only one of them announced before the filing of Goeke's brief, and only one of the by the Eighth Circuit).[6] Cf. Ford v. Georgia, 498 U.S. 411, 421-25 (1991)(lower court's procedural rule may not defeat application of this Court's constitutional decision when rule was not in existence at the time the party relying on this Court's decision would have had to assert it under subsequently created rule).

The Eighth Circuit's Rules of Appellate Procedure expressly provide for the use of footnotes in briefs before it--requiring that they "must be printed or typed in the same size type as the text of the brief." 8th Cir. R. App. P. 28A(a). Presumably this requirement was promulgated on the premise that the footnotes will be *read*.

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[6]In the only case the panel majority cites in support of its finding of waiver that was decided before the filing of Goeke's brief (on June 24, 1993), the First Circuit deemed a criminal defendant's presentation of an entrapment argument waived by "cursory presentation," and that court made the point for which the panel majority cites it *in a footnote*. United States v. Panet-Collazo, 960 F.2d 256, 261 n.3 (1st Cir.), cert. denied, 113 S.Ct. 220, and cert. denied, 113 S.Ct. 645 (1992).

The panel disparages Superintendent Goeke's invocation of Teague in his brief by referring to it as "one[]sentence." App. 5. Although all federal courts of appeals have *maximum* lengths for briefs, there is no *minimum* length requirement known to federal appellate procedure. Fed. R. App. P. 28(g). Some objections *can* be adequately stated in one sentence.

Finally, the panel refers to the placement of Superintendent Goeke's citation of this Court's decision in Teague as "buried on the last page [i.e., page *18*] of the state's lone argument." App. 5. *Branch* had only *one* point on appeal, and Goeke's brief responded to *hers*–not to her theory *and* to the different theory that members of the panel brought up for the first time at oral argument. Surely the panel does not mean to suggest that when a single point on appeal is subject to several threshold defenses, the appellee must have a *separate* point on appeal for *each* defense or else will waive a defense which *this* Court or the Congress has determined to preclude federal habeas corpus relief.

Goeke raised Teague in the district court, in his appellee's brief, and at oral argument. What else did he have to do to preserve this defense for consideration? If there is anything more that a party must do to preserve Teague, then both the lower federal courts and those who represent habeas corpus respondents before them need guidance from this Court. S. Ct. R. 10.1(a)(need for exercise of this Court's supervisory powers as ground for granting certiorari).

Goeke respectfully suggests that in the instant case, the court below has once more "plainly misread [this Court's] precedents." Delo v. Lashley, 113 S.Ct. 1222, 1224 (1993), granting certiorari and summarily reversing, 957 F.2d 1495 (8th Cir. 1992). The judgment of the court below should be reversed.

II. The court below decided a federal question in a way that conflicts with Reno v. Flores, Bowers v. Hardwick, Estelle v. Dorrough, and other decisions of this Court in holding that a state appellate court violates "substantive due process" by dismissing the appeal of a convicted felon who absconded before sentencing.

As this Court has long recognized, "substantive due process" is a suspect ground for any decision. E.g., Lochner v. New York, 198 U.S. 45, 75-76 (1905)(Holmes, J., dissenting). As it explained in Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986):

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments.

On the basis of its experience with the exercise of judicial power under the rubric of "substantive due process," this Court has adopted a method for the consideration of claims under the due process clauses which would approach or exceed the limits of its legitimate power.

In Reno v. Flores, 113 S.Ct. 1439, 1447 (1993), for example, this Court asked, *first*, whether the governmental policy under attack infringes on a "'fundamental' liberty interest," and, *if* it does, *then* whether "the infringement is narrowly tailored to serve a compelling state interest." If no "'fundamental' liberty interest" is implicated, then the policy is not unconstitutional so long as it meets "the (unexacting)

standard of rationally advancing some legitimate governmental purpose . . . ." Id. at 1148-49 (emphasis supplied).

In Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986), this Court set forth the considerations bearing on the declaration of "fundamental rights" whose infringement will justify strict judicial scrutiny:

> There should be . . . great resistance to expand the substantive reach of [the Due Process] Clauses [of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

In Bowers v. Hardwick, the Court declined to extend the scope of "fundamental rights" beyond marriage, child-rearing, procreation, contraception, and abortion to include certain private, consensual homosexual acts.

The claim in Bowers was far more modest than the panel majority's holding in the instant case. It was like those in Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); and the other cases on which Hardwick had relied, in that it involved sexuality, and sought to keep government regulation out of a private sphere.[7] This

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[7]In the subsequent decision of Planned Parenthood v. Casey, 112 S.Ct. 2791, 2805-06 (1992), the plurality of the Justices found a unifying principle in the unenumerated rights that this Court had recognized as "fundamental": "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Without disparaging the abstract *importance* of appeals, civil and criminal, there are fewer activities less "private" or "personal" than a process in which the criminal appellant is rarely present when briefs are written or cases argued, and which frequently results in an opinion discussing his or her most painful and embarrassing moments being placed in every law library of any size in the country.

Court declined to expand the category of "fundamental rights" *not* because of a lack of similarity of the subject-matter, but in light of the long-standing, nearly unanimous *legal condemnation* of sodomy, especially at the time of the ratification of the fifth and fourteenth amendments. 478 U.S. at 191-93 & nn. 5-7.

Criminal appeals and post-conviction relief appeals are radically different from the intimate conduct or family relations that appear to link Bowers with the other cases of this nature in which the Court has applied the due process clause to strike down state and federal policies. Yet the Court declined to do so in Bowers. It follows that the court below should not have done so in the instant case.

In Branch's case, the panel majority conceded that there is no federal constitutional right to a direct appeal of a criminal conviction. App. 6. See Evitts v. Lucey, 469 U.S. 387, 393 (1985); Jones v. Barnes, 463 U.S. 745, 751 (1983); Ross v. Moffitt, 417 U.S. 600, 610-11 (1974); McKane v. Durston, 153 U.S. 684, 687-88 (1894).[8] On account of her absconding, the Missouri Court of Appeals denied Branch's *post-conviction relief* appeal, as well as her direct appeal. App. 78. There is no federal constitutional right to state post-conviction relief proceedings, even at the trial-court level, let alone to an appeal from the denial of such relief. E.g., Coleman v. Thompson, 501 U.S. 722, 755-57 (1991)(citing cases).

To expand the category of "fundamental rights" to include a criminal direct appeal and a post-conviction relief

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[8]Indeed, even if the panel majority's opinion were to allowed to stand, there would *still* be no federal constitutional right to appeal. The panel majority's opinion does not purport to create a general federal constitutional right to appeal. Instead, it divides convicted criminals into *three categories*: (1) those who do not escape; (2) those who escape before filing an appeal, and are recaptured within a few days; and (3) those who escape after filing an appeal. Under the panel majority's opinion, prisoners in the first and third categories have no right to an appeal. Under its opinion, only the prisoners in the second category have such a right. Rather than creating a federally-protected right to appeal, the panel opinion creates a qualified right to escape, then appeal.

appeal would invite thousands of new claims sounding in substantive due process. For example, an appellant may claim that a state's length limitation on briefs infringes, without a sufficiently persuasive basis, his or her right to appeal. If a state appellate court may not deny a criminal defendant appellate review over a motion court's denial of post-conviction relief because he or she absconded–it will be argued–surely it may not deny this opportunity to a well-behaved prisoner who filed the motion a date late. If a state appellate court may not deny a criminal defendant the opportunity to take a direct appeal because he or she absconded–it will be argued–surely it may not deny this opportunity to a well-behaved prisoner whose lawyer files the brief a date late. And if a state must provide a prisoner who has escaped and been recaptured within three (3) days a post-conviction relief appeal, then certainly it cannot deny him or her *counsel* to brief and argue it.

Goeke's concerns are by no means hypothetical. At this writing (November 1994), the panel majority's Branch opinion is not yet printed in the Federal Reporter, Third Series, yet the Eighth Circuit has begun citing it for the proposition that "due process analysis applies to both direct and post-conviction review" in the state courts. Easter v. Endell, 1994 WL 570804, slip op. at 5 (No. 94-1255)(8th Cir. Oct. 20, 1994)(reversing district court's denial of relief because Arkansas appellate court did not make post-conviction remedy "reasonably accessible").

Once the lower federal courts become involved in second-guessing the state courts over their appellate practice on the basis of "substantive due process," there will be no clear line between constitutional adjudication–in which they act within their lawful authority–and the application of federal common law to the actions of state courts within their own jurisdictions. If a tie to the Constitution, laws, and treaties of the United States as ad hoc and subjective as the one in this case sufficed to justify the exercise of what amounts to supervisory power over the state courts, then a state-court appeal has truly become a "tryout on the road" for the "real" confrontation in the "real" courts. That is not the law. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

Assuming that there was a need to create a category of non-textual "fundamental rights" in the first place, there is no need to do so in the field of criminal procedure. The Bill of Rights spells out the protections of the rights of the accused that are fundamental in our legal culture. These include procedures analogous to appeals, including grand-jury indictment and jury trial. If the Framers had intended to include a first appeal as of right, it would have been simple enough for them to have done so.

In fact, there was no "first appeal as of right" at common law. E.g., McKane v. Durston, 153 U.S. at 687.[9] The First Congress, which adopted the Bill of Rights and sent it to the states, did not provide for *any* criminal appeals in the Judiciary Act of 1789. 1 Stat. 73. In the federal courts, criminal appeals as we know them were not introduced until 1889.[10] Thus, at the time the Bill of Rights was adopted, *and* at the time the due process clause of the *fourteenth amendment*

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[9]"A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary." McKane v. Durston, 153 U.S. 684, 687 (Harlan, J.)(emphasis supplied).

[10]"Until 1889 criminal cases were reviewable by the Supreme Court only in the event of a division of opinion in the circuit court on a question of law (Act of April 29, 1802, § 6, 2 Stat. 156, 159-61 [certification]; Act of June 1, 1872, § 1, 17 Stat. 196) or within the limited range of issues that could be raised by habeas corpus. . . . The Act of February 6, 1889, § 6, 25 Stat. 655, 656 granted a writ of error in capital cases only, extended by the Evarts Act [i.e., the Act of March 3, 1891, 26 Stat. 826] to 'infamous crimes.'" P. Bator et al., Hart & Wechsler's The Federal Courts & The Federal System 1539 n.3 (2d ed. 1973). Lest there be any doubt, the "circuit courts" to which this quotation refers were the *trial* courts in all federal criminal cases, with the exception that the district courts had concurrent jurisdiction to try "certain minor criminal offenses." Id. at 34.

was adopted, there was no right to an appeal in a criminal case arising in the courts of the United States.[11]

Even allowing for the vast difference of subject-matter between the "fundamental rights" this Court identified in Bowers, applying the standard it set out in that decision leads to the conclusion the opportunity to appeal a criminal conviction is not a "fundamental" right for the purpose of decision-making under the due process clause.

After it held that the Georgia sodomy statute attacked in Bowers did not infringe on a "fundamental right," this Court considered the argument that it was nonetheless unconstitutional because it lacked a "rational basis." Hardwick contended that the statute had no basis "other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." This Court responded:

> The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

Id. at 196. So here, if this Court were to hold that the Missouri Court of Appeals could not enforce the escape rule against Branch because it was "only" justified by a moral belief (that one who seeks the remedial offices of the law should render herself amenable to them), then *every* rule of law about which there was room for good-faith difference of opinion would be liable to constitutional challenge.

There are, undoubtedly, laws on the books which reflect moral beliefs that are no longer held as widely as they were when the laws were adopted. Attacks on rules of law on this basis are particularly inappropriate to federal habeas corpus,

[11]Although the State of Missouri was decades ahead of the federal jurisdiction in this respect, it provided for appeals by statute rather than as a matter of constitutional right. Mo. Rev. Stat. 498 § 1 (1835).

however, which exists not to make new policy, but to deter violations of *existing* rules of federal constitutional law. Teague v. Lane, 489 U.S. at 305-07, citing Solem v. Stumes, 465 U.S. 638, 653 (1984)(Powell, J., concurring in the judgment); Mackey v. United States, 401 U.S. 667, 682-83 (1971)(Harlan, J., concurring in judgments in part & dissenting in part); Desist v. United States, 394 U.S. 244, 262-63 (1969)(Harlan, J., dissenting).

One of the messages of the panel majority's opinion is that the purpose of promoting respect for the legal system is not an adequate basis for the application of the escape rule. App. 8-9. At least when it is expressed as a constitutional judgment–as it must be, to be enforceable in federal habeas corpus–this decision conflicts squarely with this Court's opinion in Estelle v. Dorrough.

In Dorrough, the prisoner had escaped for only two (2) days. Because the Texas appellate court dismissed his appeal *after* his recapture, there is no way in which the escape could have delayed its processing of his appeal or interfered with its operations in the narrow manner that the court below found necessary in order to justify application of the escape rule. 420 U.S. at 534-35. In its per curiam opinion reversing a lower court's grant of relief, this Court pointed out that the statute codifying the Texas escape rule was justified by broader policies: "It discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the [state appellate court]." Id. at 537 (footnotes omitted). Finding that the right to appeal a criminal conviction is not a "fundamental right" for the purpose of equal protection analysis, this Court applied the "rational basis" or "mere rationality" test. Id. at 538-41, citing, inter alia, San Antonio Indep. School Dist. v. Rodriguez, supra; Morey v. Doud, 354 U.S. 457, 463-64 (1957). Relying on the purposes of "deterring escapes and encouraging surrenders," this Court upheld the Texas escape rule.

If the panel majority's opinion is correct, then this Court's decision in Estelle v. Dorrough should be overruled. Just as in the instant case, Texas could not show that its

appellate court processes were delayed on account of Dorrough's two-day flight. Under the panel's reasoning, *that* is essential to the constitutional application of the escape rule. Deterring escapes and encouraging defendants to turn themselves in are insufficient grounds for applying the escape rule. To use the panel majority's expression, it "goes against the grain of due process." App. 9.

As Judge Bowman observed in his dissenting opinion, a second type of substantive due process argument is that the official conduct to be proscribed by the court's decision "shocks the conscience" of the deciding court. App. 13-14, citing Rochin v. California, 342 U.S. 165, 172 (1952). The panel majority cites Rochin as one of several asserted sources for authority to scrutinize the substance of federal and state laws under the due process clause. App. 6.

Judge Bowman has thoroughly answered the suggestion that the application of the escape rule in this case "shocks the conscience." App. 13-14. His appreciation for the constitutionality of deterrence as a quasi-legislative purpose for the escape rule is consistent with this Court's decision in Dorrough; the panel majority's rejection of it is not. In Ortega-Rodriguez v. United States, 113 S.Ct. at 1201, this Court indicated that lower federal courts may establish categories of escapees to which the escape rule will be applied automatically; as Goeke pointed out in his brief before the Eighth Circuit, persons under sentence of death or of imprisonment for life would be excellent candidates for such a categorical exception. App. 121 n.2. Judge Bowman's appreciation of the fact that a defendant under sentence of life without parole will not be deterred by the threat of a consecutive sentence for escape from confinement is consistent with this Court's decision in Ortega-Rodriguez; the panel majority's opinion is not. His resistance to the "temptation to find in the Constitution a license to write into the law our personal vision of how things ought to be," App. 16, is consistent with the structure of the Constitution itself, as well as with this Court's experience with "substantive due process"; the panel majority's result in this case is not.

In Herrera v. Collins, 113 S.Ct. 853, 864-70 (1993), this Court referred to an argument that it should have applied "substantive due process" analysis to the petitioner's claim that it would violate the due process clause to execute an innocent person. This Court observed that the argument "put[] the cart before the horse," because it presumed that the petitioner was innocent. The question before the Court was whether the prisoner was entitled to federal collateral scrutiny of his *claim* that he was innocent–years after his conviction, its affirmance on appeal, and the denial of previous state and federal habeas corpus petitions. The Court held: "This issue is properly analyzed only in terms of procedural due process." Id. at 864 n.6 (emphasis supplied).

In his dissenting opinion in Lochner v. New York, Justice Holmes reminded his Brethren that our Constitution "is not intended to embody a particular economic theory," but "is made for people of fundamentally differing views . . . " 198 U.S. at 75-76.

So in the instant case, the Constitution does not embody a strictly utilitarian theory of punishment–such that a rule of state law may be upheld on federal collateral attack only if it can be statistically supported by narrowly functional results. On the question of what sanctions a state may impose on a convicted murderer who absconds before filing an appeal, the Constitution does not command the people of the State of Missouri to believe the teachings of nineteenth-century utilitarian philosophers, under which the imposition of the escape rule would arguably be justified only to the extent that it serves the convenience of docket clerks. A Constitution "made for people of made for people of fundamentally differing views" allows the people of the State of Missouri to follow the reasoning of Socrates that by escaping, Branch "intend[ed], so far as [she had] the power, to destroy . . . the laws, and the whole state as well." Plato, Crito 50a-b (trans. H. Tredennick), in E. Hamilton & H. Cairns, eds., Plato: The Collected Dialogues 35 (1961). Adoption of the latter view would support the "disentitlement" theory whether or not the escape took place before the defendant had filed an appeal.

Following the wisdom of Justice Holmes, this Court has held that the people of the United States and of the several states may adopt different theories of jurisprudence in respect to the death penalty. Gregg v. Georgia, 426 U.S. 153, 174-88 (1976)(plurality opinion). Specifically, the people need not be able to support a deterrence theory with statistical evidence demonstrating that availability or imposition of the death penalty results in a decrease in capital crimes. Id. at 184-87.

In this case, as well, the due process clause of the fourteenth amendment does not forbid the State of Missouri from adopting a theory concerning the availability of appellate and post-conviction remedies that a majority of a given federal court would find insufficiently precise. The contrary judgment of the court below should be reversed.

Conclusion

WHEREFORE, Superintendent Goeke prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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(2)

No. 94-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRYAN GOEKE,
Superintendent, Renz Correctional Center

Petitioner,

v.

LYNDA RUTH BRANCH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION

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Modified Opinion after Denial of Rehearing in *Branch v. Turner*, No. 92-3935-WMJC (8th Cir. Sept. 21, 1994)

Lynda Branch, Appellant,

v.

William R. Turner,
Superintendent, Renz Correctional Center;
William Webster,
Attorney General of the State of Missouri,

Appellees.

No. 92-3935WM.

United States Court of Appeals, Eighth Circuit.

Sept. 21, 1994.

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FAGG, Circuit Judge.

After the Missouri Court of Appeals dismissed Lynda Branch's consolidated direct and postconviction appeals under Missouri's fugitive dismissal rule, Branch brought this 28 U.S.C. § 2254 habeas application asserting the dismissal was inconsistent with due process. The district court denied the application. Because we conclude the Missouri appellate court arbitrarily applied the fugitive dismissal rule to dismiss Branch's appeals, we reverse and remand to the district court for issuance of a writ.

In 1986, a jury convicted Branch of the first-degree murder of her husband, but the Missouri Court of Appeals reversed the conviction because of erroneously excluded evidence. State v. Branch, 757 S.W.2d 595, 598-601 (Mo.Ct.App.1988). On retrial, a jury again convicted Branch of first-degree murder. The trial court ordered a hearing to consider Branch's motion for a new trial and to sentence her. When Branch, who was free on bail, breached her promise to appear at the hearing, the trial court denied her new trial motion and issued an arrest warrant. See Mo.Rev.Stat. § 544.665 (1987). Police officers found Branch in a neighboring county three days later and returned her for sentencing. Four days after Branch was returned, the trial court sentenced her to the mandatory term of life imprisonment without parole eligibility for fifty years.

On the same day the trial court sentenced Branch, she appealed her conviction and sentence. See id. § 547.070. Because Branch's appeal was timely filed even if measured from the original sentencing hearing that she missed, Branch's three-day absence caused no delay to the commencement of appellate proceedings. See Mo.S.Ct.R. 30.01(d) (notice of appeal must be filed within ten days of final judgment). Based on asserted errors during her second trial, Branch also filed a timely motion for postconviction relief, which the trial court denied. Branch appealed this order as well. See Mo.S.Ct.R. 29.15(j). The Missouri Court of Appeals consolidated Branch's direct appeal and her postconviction appeal. See Mo.S.Ct.R. 29.15(1). Although both parties fully briefed and orally argued the case's merits before the Missouri Court of Appeals, the appellate court dismissed the consolidated appeals under the Missouri fugitive dismissal rule.

PUBLISHER'S NOTE:

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App. 3

(Mo.Ct.App.1991). The court held that Branch's "fail[ure] to appear as ordered for sentencing," by itself, "operates to disentitle [Branch's] right of appeal." Id. at 11, 12. The only explanation the court gave for the dismissal was preservation of public respect for Missouri's system of law. In response to Branch's federal habeas application, the State suggests the Missouri appellate court's dismissal of Branch's appeals also furthers the State's interest in deterring trial court disappearances. The district court concluded the dismissal of Branch's appeals did not violate Branch's due process rights.

Branch does not challenge the constitutionality of Missouri's fugitive dismissal rule. Rather, Branch contends the Missouri appellate court arbitrarily applied the rule to her because dismissing her appeals in the circumstances of her case does not advance any of the rule's purposes. Branch points out that her failure to appear at the original sentencing hearing, three-day absence, and return to custody for sentencing all took place before she filed her notice of appeal, which was timely even if measured from her original sentencing date. Because Branch's flight had no effect on appellate processes, Branch contends the appellate court violated her due process rights by dismissing her appeals under the fugitive dismissal rule. We agree.

Before discussing the merits, we first consider a threshold issue: whether we must apply the nonretroactivity principle of Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion), to Branch's contention. See Caspari v. Bohlen, 114 S.Ct. 948, 953 (1994). The nonretroactivity principle prevents a federal court from granting habeas relief to a state prisoner based on a rule announced after the prisoner's conviction and sentence become final. Id. Because the principle is not jurisdictional, a federal court may decline to

apply it if the state does not argue it. Id. Put another way, a state can waive the nonretroactivity principle by failing to raise it. Schiro v. Farley, 114 S.Ct. 783, 788-89 (1994).

Missouri waived Teague's nonretroactivity principle in responding to Branch's appeal. Missouri mentions the principle only twice in its brief. In the procedural history section, Missouri states that it raised the Teague principle in the district court. Missouri later mentions the principle in a one-sentence footnote buried on the last page of the state's lone argument–that the district court properly rejected Branch's due process claim on the merits. Missouri did not mention the nonretroactivity principle or cite Teague in its statement of the issues on appeal, and did not develop the Teague issue with supporting argument in its brief. Under these circumstances, Missouri waived our consideration of the Teague issue. See Larson v. Nutt, No. 94-1052, slip op. at 2-3 (8th Cir. Sept. 1, 1994) (per curiam) (skeletal assertion does not raise issue on appeal); Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp., 26 F.3d 375, 398 (3d Cir.1994) (passing reference to issue without discussion does not bring issue before court), petitions for cert. filed, Nos. 94-311 & 94-312 (U.S. Aug. 18, 1994); United States v. Panet-Collazo, 960 F.2d 256, 261 n. 3 (1st Cir.) (issues mentioned in a perfunctory way without developed argument deemed waived), cert. denied, 113 S.Ct. 220, and cert. denied, 113 S.Ct. 645 (1992). We thus decline to consider whether granting habeas relief to Branch requires the retroactive application of a new rule in violation of Teague.

As we turn to the merits of Branch's appeal, we make a preliminary observation. In her habeas petition, Branch pleaded a blanket due process claim. The district court analyzed Branch's claim under procedural due process

principles, and the parties' briefs on appeal focus on procedural due process. Nevertheless, at oral argument both parties acknowledged this is really a substantive due process case. Because we believe our refusal to consider the substantive due process question would be inconsistent with substantial justice, we exercise our discretion to consider this question of law on appeal. See Hormel v. Helvering, 312 U.S. 552, 557 (1941); Seniority Research Group v. Chrysler Motor Corp., 976 F.2d 1185, 1187 (8th Cir.1992); Cleland v. United States, 874 F.2d 517, 522 n. 6 (8th Cir.1989).

Branch initially concedes the federal constitution does not guarantee state criminal defendants the right to appeal. Both Branch and the State agree, however, that in integrating an appellate process into Missouri's criminal justice system, the state's appellate procedures must comply with the Due Process Clause of the federal constitution's Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 393 (1985); see Bell v. Lockhart, 795 F.2d 655, 657 (8th Cir.1986). The Due Process Clause contains a substantive component that protects individuals from government action that is arbitrary, Daniels v. Williams, 474 U.S. 327, 331 (1986), conscience-shocking, Rochin v. California, 342 U.S. 165, 172 (1952), oppressive in a constitutional sense, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989), or interferes with fundamental rights, United States v. Salerno, 481 U.S. 739, 746 (1987). See Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir.1994) (to same effect). Thus, in a case like this, a state appellate court cannot deny the right to appeal through the arbitrary application of an appellate rule. Evitts, 469 U.S. at 404-05; Allen v. Duckworth, 6 F.3d 458, 459-60 (7th Cir.1993), cert. denied, 114 S.Ct. 1106 (1994); Olson v. Hart, 965 F.2d 940, 943 (10th Cir.1992). In keeping with due

process, state appellate courts must apply their rules governing appellate review in a way that provides "a fair opportunity to obtain an adjudication on the merits of [an] appeal." Evitts, 469 U.S. at 405. The parties do not dispute that these principles apply equally to Branch's postconviction appeal.

Although the state-granted right to appeal must be administered within the boundaries of due process, the right may be denied to accommodate other legitimate appellate interests. It is well settled that a state may, consistent with the federal constitution, dismiss the appeal of a defendant who is a fugitive during the pendency of the defendant's appeal. See Allen v. Georgia, 166 U.S. 138 (1897) (upholding state's dismissal of appeal of defendant who escaped and was recaptured during appeal); Estelle v. Dorrough, 420 U.S. 534 (1975) (upholding state statute providing for appellate dismissal when defendant escapes during pendency of appeal). We also see no constitutional impediments for a state appellate court to dismiss a defendant's appeal simply because the defendant's fugitive status begins and ends during trial court proceedings. A defendant's pre-appeal flight may cause delay in appellate proceedings, disrupt an appellate court's scheduling, interfere with orderly appellate review, or prejudice the state on retrial. If a defendant's pre-appeal flight disturbs the orderly operation of a state appellate court, we believe the sanction of dismissal is justified. See Ortega-Rodriguez v. United States, 113 S.Ct. 1199, 1208 (1993) (reviewing application of Eleventh Circuit's fugitive dismissal rule under supervisory power of federal courts); id. at 1211 (Rehnquist, C.J., dissenting). When a state appellate court vindicates the intrusion on its processes by applying the fugitive dismissal rule, the dismissal deters fugitive activity and promotes respect for the judicial system. See id. at

1207 (majority opinion); id. at 1212 (Rehnquist, C.J., dissenting).

If a defendant's pre-appeal flight does not adversely affect the appellate process, however, there is no rational justification for a state appellate court to strip the defendant of the right to appeal under the fugitive dismissal rule. See Woods v. Kemna, 13 F.3d 1244, 1246 (8th Cir.1994). The fugitive dismissal rule is not an end in itself; instead, it is the means of protecting the appellate interests served by the rule. To use the rule as a general tool of deterrence and respect when appellate interests are not affected divorces the rule from its purpose of protecting appellate courts and arbitrarily transforms the rule from one triggered by appellate consequences into one of automatic dismissal and additional punishment for pre-appeal flight. See Mo.Rev.Stat. § 544.665 (failure to appear in trial court as ordered is punishable as felony). Thus, our inquiry focuses on whether Branch's misconduct had any effect on Missouri appellate procedures, justifying an appellate dismissal.

Neither the Missouri Court of Appeals nor the State suggests that Branch's failure to appear for sentencing in the trial court and three-day flight had any effect on the appellate system. Because the State was forced to locate, capture, and return Branch for sentencing, the short duration of Branch's flight alone does not mitigate against the rule's application. Nevertheless, Branch's abbreviated absence did not delay the onset of appellate proceedings, inconvenience the appellate court's operation, or disrupt appellate processes. Branch filed her appeal within the ten-day limit measured from the sentencing date she missed. Furthermore, the appellate court did not suggest (and the State does not contend) that Branch's flight would prejudice the State's ability to retry Branch if she prevailed on appeal.

In short, Branch's fugitive status did not trigger any of the appellate consequences the fugitive dismissal rule is designed to protect against, and thus, the Missouri appellate court had no justification to use the rule as an instrument of deterrence and respect. In these circumstances, the Missouri appellate court's misuse of the rule to dismiss Branch's appeals runs against the grain of due process. Indeed, Branch prevailed on her first direct criminal appeal, and neither the Missouri appellate court nor the State suggests that her current appeals are legally frivolous. Thus, the appellate court's dismissal, based on nothing more than Branch's failure to appear as ordered for sentencing, is clearly at odds with Missouri's recognition that a convicted defendant's liberty should not be curtailed "unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with law." Evitts, 469 U.S. at 403-04. In our view, the court deprived Branch of the fair opportunity to obtain a decision on the merits of her appeals in violation of her due process rights.

We reverse the district court's judgment and remand with directions to grant the writ unless the State takes steps to consider the merits of Branch's consolidated appeals within a reasonable time fixed by the district court.

BOWMAN, Circuit Judge, dissenting.

I respectfully dissent from the Court's holding that the state, in applying its escape rule to Branch, has violated her right to substantive due process.

The Missouri legislature first announced in 1835 that, upon a criminal conviction, "an appeal to the supreme court shall be allowed," subject to certain procedural

requirements. Mo.Rev.Stat. at 498 § 1 (1835). In 1889, the Missouri Supreme Court further modified the statutory right to appeal and adopted the common-law escape rule, noting that an escaped convict "is in contempt of the authority of the court and of the law" and "[t]o permit such a course of conduct to be successful would be trifling with justice, and will not be tolerated," regardless that the state might bring in the prisoner via a capias warrant. State v. Carter, 11 S.W. 979, 980 (Mo.1889). Subsequently, the United States Supreme Court upheld the constitutionality of the escape rule. Allen v. Georgia, 166 U.S. 138, 140-41 (1897). Recognizing its own limits in a case challenging the powers reserved to the states, the Court said, "[I]f the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process." Id. at 140. The rule as it has developed in Missouri is still viable today. See State v. Peck, 652 S.W.2d 244, 245 (Mo.Ct.App.1983) ("Missouri has long had the rule that a defendant who escapes or flees the jurisdiction of its courts either during trial or in the process of post-trial proceedings forfeits his rights to an appeal upon the merits of the cause.").

Branch does not challenge the constitutionality of the escape rule per se. The only issue before this Court on appeal from the District Court's denial of the writ is whether Missouri violates a defendant's due process rights[1]

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[1]As the opinion of the Court suggests, ante at 5, it is rather clear that Branch's broad assertion of a due process violation, as set forth in her petition for the writ, did not properly raise the substantive due process issue in the District Court. It was not a subject of discussion in the

by dismissing an appeal under the common-law escape rule when the fleeing defendant is recaptured three days after failing to appear for sentencing, and before she has filed her notice of appeal.

I begin with the undisputed fact that the Constitution does not compel the states to offer an appeal as of right to criminal defendants upon conviction. Evitts v. Lucey, 469 U.S. 387, 393 (1985). But "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution–and, in particular, in accord with the Due Process Clause." Id. at 401. In addition to the better-known (and better-understood) concept of procedural due process, the Supreme Court has recognized the concept of substantive due process, which "prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" United States v. Salerno, 481 U.S. 739, 746 (1987) (citations omitted). Notwithstanding the uncertain

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court's denial of the writ. Moreover, the argument Branch makes in her brief is a procedural due process argument. See Brief of Appellant at 10-12. It was not until prodded by this Court at oral argument that counsel for Branch acknowledged he was advancing an argument based on substantive due process. Thus the issue may not be properly before this Court in the first instance, and I do not agree that "our refusal to consider the substantive due process question would be inconsistent with substantial justice." Ante at 5. Nevertheless, because the Court bases its decision on substantive due process, I respond with this dissent addressing the merits of Branch's putative substantive due process claim.

scope of substantive due process,[2] I believe the Court misapplies the concept in this situation to justify granting the writ.

Considering the second substantive due process test first, if state action encroaches upon a fundamental right, then "the infringement [must be] narrowly tailored to serve a compelling state interest. 'Substantive due process' analysis must begin with a careful description of the asserted right...." Reno v. Flores, 113 S.Ct. 1439, 1447 (1993) (citations omitted). As noted above, there is no fundamental right "implicit in the concept of ordered liberty" implicated here--that is, no right to appeal a criminal conviction is in the text of the Constitution and such a right has not been discovered in the "emanations" from that document. The Court's opinion does not so assert. Therefore, it is unnecessary to consider whether

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> Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.

Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985) (quoting Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 543-44 (1977) (White, J., dissenting)).

Missouri's interests in the escape rule are compelling or whether the escape rule is narrowly tailored to serve those interests. Because no fundamental right is implicated, there is no justification for the Court's finding a federal constitutional violation here merely because Missouri's appellate process is not adversely affected by Branch's escape.

As for the other substantive due process test, which presumably becomes relevant in the absence of a fundamental right, Missouri's escape rule as applied to Branch does not shock the conscience. Cf. Rochin v. California, 342 U.S. 165, 172 (1952) (concluding that pumping the stomach of a suspect in the search for evidence "shocks the conscience"). It does not shock the conscience for Missouri to apply a rule that strips a criminal defendant of her statutory (not constitutional) right to appeal her conviction when she chooses to show contempt for the courts and the laws of the state by failing to appear for sentencing after her conviction by a jury. It does not shock the conscience for the Missouri courts to conclude that "[t]hose who seek the protection of this legal system must ... be willing to abide by its rules and decisions" or else forfeit its protections. State v. Wright, 763 S.W.2d 167, 168-69 (Mo.Ct.App.1988). It does not shock the conscience to punish a fleeing felon, subject to imprisonment for life, by divesting her of the statutory appeal process that otherwise would be available to her, rather than to punish her indiscernibly by adding prison time for contempt onto a life sentence. It does not shock the conscience to deprive a convicted felon who has taken it on the lam of her right to appeal her conviction in order to deter others from flaunting the law and putting the system to the expense and effort of finding fleeing felons

and returning them to the jurisdiction of the court, regardless of the length of time they may be missing.

I do not agree that the escape rule as applied to Branch is "arbitrary" or without a "rational justification," as the Court's opinion, ante at 6, 7, asserts, but those are not substantive due process tests in any event. The case upon which the Court relies for the "arbitrary" standard does in fact quote the word in passages found in Supreme Court cases that describe state actions prohibited by the Due Process Clause, but it is clear that in the cases quoted (both from the 1880's) the term was used in connection with procedural due process rights (to criminal indictment) or with fundamental rights (to pursue a lawful profession). Daniels v. Williams, 474 U.S. 327, 331 (1986). In any case the Supreme Court cited those cases in dicta for a purpose unrelated to determining substantive due process violations. In its discussion of substantive due process protections further con, the Daniels Court cites Rochin, where the Court set forth the "shocks the conscience" standard. Id. In any event, in the very same term the Court recognized that it "has no license to invalidate legislation [under substantive due process] which it thinks merely arbitrary or unreasonable." Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (quoting Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 544 (1977) (White, J., dissenting)); cf. Collins v. City of Harker Heights, Tex., 112 S.Ct. 1061, 1070 (1992) (holding that alleged omission by city could not "properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense"). In Salerno, 481 U.S. at 746, decided two years later, the Court made no mention of an "arbitrary" standard in setting out what sort of government actions may constitute a violation of substantive due process rights.

The Court's analysis here apparently is drawn from the Supreme Court's opinion in Ortega-Rodriguez v. United States, 113 S.Ct. 1199 (1993), rather than from constitutional jurisprudence. The Ortega-Rodriguez Court concluded that, "when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal." Id. at 1209. The Ortega-Rodriguez decision, however, was an exercise of the Supreme Court's supervisory power over the lower federal courts and, as no constitutional claims were considered in the case, the rationale of the decision is irrelevant to a proper adjudication of the present case. It is of no consequence to the constitutionality of state procedures that the United States Supreme Court has used its supervisory power to limit the scope of the federal common-law escape rule. "[T]he right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper.... [W]hether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself." McKane v. Durston, 153 U.S. 684, 687-88 (1894). Absent a constitutional violation, the principles of federalism require this Court to accept Missouri's escape rule as formulated by Missouri's courts. See Allen, 166 U.S. at 140-41 ("We might ourselves have pursued a different course in this case, but that is not the test. The [appellant] must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."). Ortega-Rodriguez thus has relevance only to the extent it may influence the Missouri Supreme Court in the exercise of its supervisory authority over Missouri's escape rule. See Robinson v. State, 854 S.W.2d 393, 395 n. 2 (Mo.1993) (en banc) (suggesting the

possibility of that court's reviewing Missouri's escape rule in light of Ortega-Rodriguez, but noting the issue had not yet come before it).

In the absence of a federal constitutional violation, this Court cannot grant habeas relief. Neither Branch nor the Court has described such a violation. We must resist the temptation to find in the Constitution a license to write into law our personal vision of how things ought to be. Fidelity to the Constitution demands, among other things, that we scrupulously refrain from asserting powers the Constitution, properly understood, does not give us. I would affirm the District Court's denial of the writ.

Dispositive Order in *Branch v. Goeke*, No. 91-4433-CV-C-9 (W.D. Mo. Sept. 23, 1992)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

LYNDA R. BRANCH,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 91-4433-CV-C-9
	)	
BRYAN GOEKE,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

I. Procedural Background

Petitioner Lynda Branch, who is currently confined at the Renz Correctional Center in Jefferson City, Missouri, has filed an Application for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (1977), challenging the conviction and sentence entered in State v. Branch, No. 30DEC88-120833, Circuit Court of Boone County, Missouri (April 10, 1989). In that case, petitioner was convicted by a jury on one count of first degree murder in violation of Mo. Rev. Stat. § 565.020. Petitioner failed to appear for sentencing on April 3, 1989, and the court issued a capias warrant for her arrest. She was found in Moniteau County, Missouri, on April 6, 1989, and returned to Boone County.

On April 10, 1989, petitioner was sentenced to a term of life imprisonment without possibility of parole.

On April 10, 1989, petitioner filed a Notice of Appeal to the Missouri Court of Appeals, Western District. On August 4, 1989, petitioner filed a Rule 29.15 Motion for Post-Conviction Relief. Following an evidentiary hearing held on February 9, 1990, the circuit court on April 20, 1990, denied the Rule 29.15 denying the Rule 29.15 motion.

The appeals from the conviction and from the denial of the Rule 29.15 motion were consolidated by the Missouri Court of Appeals, Western District. The State of Missouri filed a motion to dismiss the consolidated appeals on the ground that petitioner's escape from lawful custody and disobedience to the orders of the circuit court forfeited her right to appeal. On April 30, 1991, after briefing and oral argument on the Motion to Dismiss, the Court of Appeals dismissed both appeals. See State v. Branch, 811 S.W.2d 11 (Mo. App. 1991).

No evidentiary hearing was held to determine the reason for petitioner's failure to appear for sentencing. Nevertheless, at her sentencing on April 10, 1989, in response to the court's general question, "Is there any statement which you wish to make to the court prior to imposing judgment and sentence?," petitioner stated,

> I don't care. I wrote this out but I will just read it to you. First and foremost, I will apologize for not appearing on the 3rd. My actions were just due to my confusion and my extreme emotional duress. The sentence the jury recommended was just beyond my

> comprehension. I still contend that I am not guilty, that I did not deliberately kill my husband, that I acted in self defense of myself and my child.

Tr. 857.

Petitioner raises the following grounds for relief: 1) the order by the Court of Appeals dismissing petitioner's appeals violated the petitioner's rights to due process and equal protection of the law; 2) petitioner was denied her right to effective assistance of counsel; 3) the state court erred in denying petitioner's Motion for Judgment of Acquittal at the close of the State's case; 4) the state court erred in denying petitioner's Motion for Judgment of Acquittal at the close of all evidence; 5) the state court erred in denying petitioner's Motion to Suppress Statements made by petitioner prior to being given Miranda warnings; 6) the state court erred in denying petitioner's Motion to Suppress Evidence; 7) the state court erred in overruling petitioner's objection to the admission of a white bed sheet because the sheet was the product of an unlawful search and seizure; 8) the state court erred in not allowing petitioner to introduce a copy of a dissolution petition; g) the state court erred in overruling petitioner's objection to the opinion testimony of Craig Faith because he was not properly qualified as an expert; 10) the state court erred in overruling petitioner's objection to certain photographs of the victim being shown to the jury; 11) the state court erred in allowing the photographs to remain exhibited in the courtroom; 12) the state court erred in allowing into evidence photographs of clothes on a washing machine; 13) the state court erred in refusing to give instructions A through E requested by petitioner; 14) the state court erred by not allowing into evidence the opinion testimony of Dr.

erred by not allowing into evidence the opinion testimony of Dr. Daniel regarding petitioner's status as a battered woman; 15) the state court erred and petitioner was prejudiced by communications during trial between the court and the Honorable Tom Brown, who prosecuted the first trial in this case; and 16) new evidence has been discovered further substantiating the history of abuse of petitioner by petitioner's husband. Application for Writ of Habeas Corpus at 5-11.

II. Discussion

"Missouri has long had the rule that a defendant who escapes or flees the jurisdiction of its courts either during trial or in the process of post-trial proceedings forfeits his rights to an appeal upon the merits of the cause." State v. Peck, 652 S.W.2d 244, 245 (Mo. App. 1983). Missouri courts have stated numerous rationales to support this "escape rule," including the inherent need for a court to have control over those who come before it seeking relief, prejudice to the state in the event of a remand for a new trial, discouraging escape, encouraging surrender, promoting the dignified operation of the appellate court, and preserving respect for our system of law. See State v. Branch, 811 S.W.2d at 12; State v. Wright, 763 S.W.2d 167, 168 (Mo. App. 1988); State v. Kearns, 743 S.W.2d 553, 554-55 (Mo. App. 1987). "Those who seek the protection of this legal system must . . . be willing to abide by its rules and decisions." Wright, 763 S.W.2d at 168-69.

A. Due Process

Petitioner argues that the Missouri Court of Appeals violated the Due Process Clause of the

conviction without holding a hearing to determine why petitioner failed to appear for sentencing.

"A district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a). There is no constitutional right to an appeal of a judgment of conviction. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983); McKane v. Durston, 153 U.S. 684, 687, 14 S. Ct. 913, 915 (1894); Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590 (1956) (plurality opinion). Nevertheless, if a state has created appellate courts as an integral part of its system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 834 (1985).

Missouri provides for a direct appeal as of right upon a judgment of conviction. Mo. Ann. Stat. § 547.070 (Vernon 1987). Thus, the direct appeal as of right is an integral part of the system for finally adjudicating the guilt or innocence of a defendant and Missouri may not act to deprive an individual of that right in violation of the Due Process Clause.

To determine whether a constitutional violation has occurred, it is necessary to ask what process the state provided and whether it was constitutionally adequate. Zinermon v. Burch, 110 S. Ct. 975, 983 (1990). Due process is a "flexible concept . . . the processes required by the Constitution with respect to the termination of a protected interest will vary depending on the importance

by the Constitution with respect to the termination of a protected interest will vary depending on the importance attached to the interest and the particular circumstances under which the deprivation may occur." Walters v. National Assn. of Radiation Survivors, 473 U.S. 305, 320, 105 S. Ct. 3180, 3189 (1985). "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985) (quoting Mullane v. Central Hanover Bank, 339 U.S. 306, 313, 70 S. Ct. 652, 656 (1950)).

A procedural due process analysis entails a balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).

Here, the private interest that will be affected by the official action is petitioner's right to appeal a criminal

> recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial portions of criminal convictions are reversed by state appellate courts. Thus, to deny adequate review . . . means that many . . . may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Griffin v. Illinois, 351 U.S. at 12, 76 S. Ct. at 585.

Considering the second factor in a due process analysis, the risk of an erroneous deprivation of the right of appeal is substantial when the Missouri Court of Appeals automatically dismisses an appeal for a failure to comply with court orders or procedural rules. If Missouri's rationale for depriving an individual of the right to appeal is the individual's contempt for the law by not complying with a court order, there must be some showing that the reason the criminal defendant failed to comply with a court order was contempt for the law.

Finally, the burden on Missouri to provide a hearing on the reason why the defendant did not comply with a court order is minimal. Missouri has a substantial interest in encouraging obedience to procedural rules and court orders.

Here, the record shows that petitioner's absence was not due to events beyond her control, but merely to her confusion and unwillingness to accept the verdict. Therefore, petitioner's right to due process of law was not violated when the Missouri Court of Appeals dismissed her appeals pursuant to the escape rule.

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B. Equal Protection

Petitioner argues that the Missouri Court of Appeals violated the Equal Protection Clause of the Fourteenth Amendment by dismissing her direct appeal from her judgment of conviction. It is unclear why petitioner believes she has been denied equal protection.

Generally, the constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 55, 93 S. Ct. 1278, 1308 (1973). State action is subjected to a higher level of scrutiny only if the classification interferes with the exercise of a fundamental right, e.g., the right of privacy, Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); the right to vote, Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849 (1972); the right of interstate travel, Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969); rights guaranteed by the First Amendment, Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. 5 (1968); or the right to procreate, Skinner v. State of Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942), or operates to the peculiar disadvantage of a suspect class, e.g., alienage, Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848 (1971); race, McLaughlin v. State of Florida, 379 U.S. 184, 85 Sr Ct. 283 (1964); or

rationales stated by Missouri courts in support of the escape rule are all legitimate state interests and the escape rule rationally furthers these interests. Accordingly, the escape rule as applied to petitioner does not violate the Equal Protection Clause.

C. Procedural Default

The state argues that petitioner's claims for relief other than those involving the escape rule, are barred by her procedural default in failing to appear for sentencing.

A federal court can consider the merits of a habeas corpus petition only when the prisoner has fairly presented to the state courts the substance of her federal habeas corpus claim. Buckley, 892 F.2d at 718. If the federal claim has not been presented to the state courts, it is procedurally barred in federal court and must be dismissed, unless the prisoner can show both adequate cause to excuse her failure to raise the claim in state court and actual prejudice resulting from the alleged violation of federal law. Wainwright v. Sykes, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506 (1977); Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991). Given a procedural default and no showing of cause and prejudice, the habeas corpus petition must be dismissed. Buckley v. Lockhart, 892 F.2d at 715, 718 (8th Cir. 1989).

Under the cause and prejudice test, cause "must be something external to the petitioner, something that cannot fairly be attributed to him." Coleman, 111 S. Ct. at 2566. Here, petitioner did not properly raise her other claims on appeal in state court. These claims were not considered because petitioner was held to have "escaped," thereby forfeitinq her right to have the Court of Appeals consider

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Thus, petitioner's procedural default in state court bars her from raising these issues in this proceeding.

III. Disposition

For the reasons stated, it is ORDERED that the Petition for Writ of Habeas Corpus is denied.

s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri
September 23, 1992.

Opinion in *Branch v. Turner*, No. 92-3935-WMJC (8th Cir. June 28, 1994)

Lynda Branch,

Appellant,

v.

William R. Turner,
Superintendent, Renz Correctional Center;
William Webster,
Attorney General of the State of Missouri,

Appellees.

No. 92-3935.

United States Court of Appeals,
Eighth Circuit.

Submitted: September 15, 1993.
Filed: June 28, 1994.

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FAGG, Circuit Judge.

After the Missouri Court of Appeals dismissed Lynda Branch's consolidated direct and postconviction appeals under Missouri's fugitive dismissal rule, Branch brought this 28 U.S.C. § 2254 habeas application asserting the dismissal was inconsistent with due process. The

district court denied the application. Because we conclude the Missouri appellate court arbitrarily applied the fugitive dismissal rule to dismiss Branch's appeals, we reverse and remand to the district court for issuance of a writ.

In 1986, a jury convicted Branch of the first-degree murder of her husband, but the Missouri Court of Appeals reversed the conviction because of erroneously excluded evidence. State v. Branch, 757 S.W.2d 595, 598-601 (Mo.Ct.App.1988). On retrial, a jury again convicted Branch of first-degree murder. The trial court ordered a hearing to consider Branch's motion for a new trial and to sentence her. When Branch, who was free on bail, breached her promise to appear at the hearing, the trial court denied her new trial motion and issued an arrest warrant. See Mo.Rev.Stat. § 544.665 (1987). Police officers found Branch in a neighboring county three days later and returned her for sentencing. Four days after Branch was returned, the trial court sentenced her to the mandatory term of life imprisonment without parole eligibility for fifty years.

On the same day the trial court sentenced Branch, she appealed her conviction and sentence. See id. § 547.070. Because Branch's appeal was timely filed even if measured from the original sentencing hearing that she missed, Branch's three-day absence caused no delay to the commencement of appellate proceedings. See Mo.S.Ct.R. 30.01(d) (notice of appeal must be filed within ten days of final judgment). Based on asserted errors during her second trial, Branch also filed a timely motion for postconviction relief, which the trial court denied. Branch appealed this order as well. See Mo.S.Ct.R. 29.15(j). The Missouri Court of Appeals consolidated Branch's direct appeal and her postconviction appeal. See Mo.S.Ct.R. 29.15(l). Although

both parties fully briefed and orally argued the case's merits before the Missouri Court of Appeals, the appellate court dismissed the consolidated appeals under the Missouri fugitive dismissal rule.

The Missouri Supreme Court first applied the fugitive dismissal rule more than one hundred years ago. See State v. Carter, 98 Mo. 431, 11 S.W. 979 (1889). In Carter, the court dismissed the appeal of a sentenced defendant who escaped after filing the appeal because the defendant's escape prevented the court from rendering an enforceable judgment and the court would not permit the fugitive to trifle with the court's operations in this way. Id. at 980. Since Carter, Missouri appellate courts have used the fugitive dismissal rule to protect themselves from defendants whose fugitive activity delays, disrupts, or distracts the courts' proper operation. See State v. Kearns, 743 S.W.2d 553, 554-55 (Mo.Ct.App.1987). In recent years, the Missouri appellate courts have expanded the rule to dismiss the appeals of convicted defendants who failed to appear for sentencing, but were returned to the trial court and sentenced before filing an appeal. See, e.g., id. (dismissing defendant's appeal after defendant's six-year absence from trial court caused administrative complications in appellate court and would prejudice state on retrial); State v. Wright, 763 S.W.2d 167, 168 (Mo.Ct.App.1988) (dismissing defendant's appeal after defendant's five-month flight delayed filing of the appeal). Missouri appellate courts recognize that the fugitive dismissal rule's use discourages unlawful flight, promotes the dignity of appellate court proceedings, and preserves respect for the legal system. Robinson v. State, 854 S.W.2d 393, 395 (Mo.1993) (en banc); Wright, 763 S.W.2d at 168.

Without suggesting that Branch's failure to appear interfered with the appellate process, threatened any appellate court functions, or otherwise had any effect on its orderly operation, the Missouri Court of Appeals invoked the fugitive dismissal rule and dismissed Branch's consolidated appeals. State v. Branch, 811 S.W.2d 11, 12 (Mo.Ct.App.1991). The court held that Branch's "fail[ure] to appear as ordered for sentencing," by itself, "operates to disentitle [Branch's] right of appeal." Id. at 11, 12. The only explanation the court gave for the dismissal was preservation of public respect for Missouri's system of law. In response to Branch's federal habeas application, the State suggests the Missouri appellate court's dismissal of Branch's appeals also furthers the State's interest in deterring trial court disappearances. The district court concluded the dismissal of Branch's appeals did not violate Branch's due process rights.

Branch does not challenge the constitutionality of Missouri's fugitive dismissal rule. Rather, Branch contends the Missouri appellate court arbitrarily applied the rule to her because dismissing her appeals in the circumstances of her case does not advance any of the rule's purposes. Branch points out that her failure to appear at the original sentencing hearing, three-day absence, and return to custody for sentencing all took place before she filed her notice of appeal, which was timely even if measured from her original sentencing date. Because Branch's flight had no effect on appellate processes, Branch contends the appellate court violated her due process rights by dismissing her appeals under the fugitive dismissal rule. We agree.

At the outset, Branch concedes the federal constitution does not guarantee state criminal defendants the right to appeal. Both Branch and the State agree, however,

that in integrating an appellate process into Missouri's criminal justice system, the state's appellate procedures must comply with the Due Process Clause of the federal constitution's Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985); see Bell v. Lockhart, 795 F.2d 655, 657 (8th Cir.1986). The Due Process Clause contains a substantive component that protects individuals from government action that is arbitrary, Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986), conscience-shocking, Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), oppressive in a constitutional sense, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), or interferes with fundamental rights, United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). See Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir.1994) (to same effect). Thus, in a case like this, a state appellate court cannot deny the right to appeal through the arbitrary application of an appellate rule. Evitts, 469 U.S. at 404-05, 105 S.Ct. at 840-41; Allen v. Duckworth, 6 F.3d 458, 459-60 (7th Cir.1993), cert. denied, -- U.S. —, 114 S.Ct. 1106, 127 L.Ed.2d 417 (1994); Olson v. Hart, 965 F.2d 940, 943 (10th Cir.1992). In keeping with due process, state appellate courts must apply their rules governing appellate review in a way that provides "a fair opportunity to obtain an adjudication on the merits of [an] appeal." Evitts, 469 U.S. at 405, 105 S.Ct. at 841. The parties do not dispute that these principles apply equally to Branch's postconviction appeal.

Although the state-granted right to appeal must be administered within the boundaries of due process, the right may be denied to accommodate other legitimate appellate interests. It is well settled that a state may, consistent with

the federal constitution, dismiss the appeal of a defendant who is a fugitive during the pendency of the defendant's appeal. See Allen v. Georgia, 166 U.S. 138, 17 S.Ct. 525, 41 L.Ed. 949 (1897) (upholding state's dismissal of appeal of defendant who escaped and was recaptured during appeal); Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975) (upholding state statute providing for appellate dismissal when defendant escapes during pendency of appeal). We also see no constitutional impediments for a state appellate court to dismiss a defendant's appeal simply because the defendant's fugitive status begins and ends during trial court proceedings. A defendant's pre-appeal flight may cause delay in appellate proceedings, disrupt an appellate court's scheduling, interfere with orderly appellate review, or prejudice the state on retrial. If a defendant's pre-appeal flight disturbs the orderly operation of a state appellate court, we believe the sanction of dismissal is justified. See Ortega-Rodriguez v. United States, — U.S. —, —, 113 S.Ct. 1199, 1208, 122 L.Ed.2d 581 (1993) (reviewing application of Eleventh Circuit's fugitive dismissal rule under supervisory power of federal courts); id. — U.S. at —, 113 S.Ct. at 1211 (Rehnquist, C.J., dissenting). When a state appellate court vindicates the intrusion on its processes by applying the fugitive dismissal rule, the dismissal deters fugitive activity and promotes respect for the judicial system. See id. — U.S. at —, 113 S.Ct. at 1207 (majority opinion); id. — U.S. at —, 113 S.Ct. at 1212 (Rehnquist, C.J., dissenting).

If a defendant's pre-appeal flight does not adversely affect the appellate process, however, there is no rational justification for a state appellate court to strip the defendant of the right to appeal under the fugitive dismissal rule. See Woods v. Kemna, 13 F.3d 1244, 1246 (8th Cir.1994). The fugitive dismissal rule is not an end in itself; instead, it is

the means of protecting the appellate interests served by the rule. To use the rule as a general tool of deterrence and respect when appellate interests are not affected divorces the rule from its purpose of protecting appellate courts and arbitrarily transforms the rule from one triggered by appellate consequences into one of automatic dismissal and additional punishment for pre- appeal flight. See Mo.Rev.Stat. § 544.665 (failure to appear in trial court as ordered is punishable as felony). Thus, our inquiry focuses on whether Branch's misconduct had any effect on Missouri appellate procedures, justifying an appellate dismissal.

Neither the Missouri Court of Appeals nor the State suggests that Branch's failure to appear for sentencing in the trial court and three-day flight had any effect on the appellate system. Because the State was forced to locate, capture, and return Branch for sentencing, the short duration of Branch's flight alone does not mitigate against the rule's application. Nevertheless, Branch's abbreviated absence did not delay the onset of appellate proceedings, inconvenience the appellate court's operation, or disrupt appellate processes. Branch filed her appeal within the ten-day limit measured from the sentencing date she missed. Furthermore, the appellate court did not suggest (and the State does not contend) that Branch's flight would prejudice the State's ability to retry Branch if she prevailed on appeal.

In short, Branch's fugitive status did not trigger any of the appellate consequences the fugitive dismissal rule is designed to protect against, and thus, the Missouri appellate court had no justification to use the rule as an instrument of deterrence and respect. In these circumstances, the Missouri appellate court's misuse of the rule to dismiss Branch's appeals runs against the grain of due process.

Indeed, Branch prevailed on her first direct criminal appeal, and neither the Missouri appellate court nor the State suggests that her current appeals are legally frivolous. Thus, the appellate court's dismissal, based on nothing more than Branch's failure to appear as ordered for sentencing, is clearly at odds with Missouri's recognition that a convicted defendant's liberty should not be curtailed "unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with law." Evitts, 469 U.S. at 403-04, 105 S.Ct. at 840. In our view, the court deprived Branch of the fair opportunity to obtain a decision on the merits of her appeals in violation of her due process rights.

We reverse the district court's judgment and remand with directions to grant the writ unless the State takes steps to consider the merits of Branch's consolidated appeals within a reasonable time fixed by the district court.

BOWMAN, Circuit Judge, dissenting.

I respectfully dissent.

The Missouri legislature first announced in 1835 that, upon a criminal conviction, "an appeal to the supreme court shall be allowed," subject to certain procedural requirements. Mo.Rev.Stat. at 498 § 1 (1835). In 1889, the Missouri Supreme Court further modified the statutory right to appeal and adopted the common-law escape rule, noting that an escaped convict "is in contempt of the authority of the court and of the law" and "[t]o permit such a course of conduct to be successful would be trifling with justice, and will not be tolerated," regardless that the state might bring in the prisoner via a capias warrant. State v. Carter, 98

Mo. 431, 11 S.W. 979, 980 (1889). Subsequently, the United States Supreme Court upheld the constitutionality of the escape rule. Allen v. Georgia, 166 U.S. 138, 140-41, 17 S.Ct. 525, 526- 27, 41 L.Ed. 949 (1897). Recognizing its own limits in a case challenging the powers reserved to the states, the Court said, "[I]f the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process." Id. at 140, 17 S.Ct. at 526. The rule as it has developed in Missouri is still viable today. See State v. Peck, 652 S.W.2d 244, 245 (Mo.Ct.App.1983) ("Missouri has long had the rule that a defendant who escapes or flees the jurisdiction of its courts either during trial or in the process of post-trial proceedings forfeits his rights to an appeal upon the merits of the cause.").

Branch does not challenge the constitutionality of the escape rule per se. The only issue before this Court on appeal from the District Court's denial of the writ is whether Missouri violates a defendant's due process rights[1]

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[1]It is not altogether clear to me that Branch's broad assertion of a due process violation, as set forth in her petition for the writ, properly raised the substantive due process issue in the District Court. It was not a subject of discussion in the court's denial of the writ. Moreover, the argument Branch makes in her brief is a procedural due process argument. See Brief of Appellant at 10-12. It was not until prodded by this Court at oral argument that counsel for Branch acknowledged he was advancing an argument based on substantive due process. Thus the issue may not be properly before this Court in the first instance. Nevertheless, because the Court is giving Branch the benefit

by dismissing an appeal under the common-law escape rule when the fleeing defendant is recaptured three days after failing to appear for sentencing, and before she has filed her notice of appeal.

I begin with the undisputed fact that the Constitution does not compel the states to offer an appeal as of right to criminal defendants upon conviction. Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985). But "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." Id. at 401, 105 S.Ct. at 839. In addition to the better-known (and better-understood) concept of procedural due process, the Supreme Court has recognized the concept of substantive due process, which "prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.' " United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (citations omitted). Notwithstanding the uncertain scope of substantive due process,[2] I believe

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of the doubt, I respond with this dissent.

2

> Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth

the Court misapplies the concept in this situation to justify granting the writ.

Considering the second substantive due process test first, if state action encroaches upon a fundamental right, then "the infringement [must be] narrowly tailored to serve a compelling state interest. 'Substantive due process' analysis must begin with a careful description of the asserted right...." Reno v. Flores, -- U.S. ---, ----, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993) (citations omitted). As noted above, there is no fundamental right "implicit in the concept of ordered liberty" implicated here--that is, no right to appeal a criminal conviction is in the text of the Constitution and such a right has not been discovered in the "emanations" from that document. The Court's opinion does not so assert. Therefore, it is unnecessary to consider whether Missouri's interests in the escape rule are compelling or whether the escape rule is narrowly tailored to serve those interests. Because no fundamental right is implicated, there is no justification for the Court's finding a federal constitutional violation here merely because Missouri's appellate process is not adversely affected by Branch's escape.

As for the other substantive due process test, which presumably becomes relevant in the absence of a

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Amendments.

Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985) (quoting Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 543-44, 97 S.Ct. 1932, 1958, 52 L.Ed.2d 531 (1977) (White, J., dissenting)).

fundamental right, Missouri's escape rule as applied to Branch does not shock the conscience. Cf. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952) (concluding that pumping the stomach of a suspect in the search for evidence "shocks the conscience"). It does not shock the conscience for Missouri to apply a rule that strips a criminal defendant of her statutory (not constitutional) right to appeal her conviction when she chooses to show contempt for the courts and the laws of the state by failing to appear for sentencing after her conviction by a jury. It does not shock the conscience for the Missouri courts to conclude that "[t]hose who seek the protection of this legal system must ... be willing to abide by its rules and decisions" or else forfeit its protections. State v. Wright, 763 S.W.2d 167, 168-69 (Mo.Ct.App.1988). It does not shock the conscience to punish a fleeing felon, subject to imprisonment for life, by divesting her of the statutory appeal process that otherwise would be available to her, rather than to punish her indiscernibly by adding prison time for contempt onto a life sentence. It does not shock the conscience to deprive a convicted felon who has taken it on the lam of her right to appeal her conviction in order to deter others from flaunting the law and putting the system to the expense and effort of finding fleeing felons and returning them to the jurisdiction of the court, regardless of the length of time they may be missing.

I do not agree that the escape rule as applied to Branch is "arbitrary" or without a "rational justification," as the Court's opinion, ante at 1337, asserts, but those are not substantive due process tests in any event. The case upon which the Court relies for the "arbitrary" standard does in fact quote the word in passages found in Supreme Court cases that describe state actions prohibited by the Due

Process Clause, but it is clear that in the cases quoted (both from the 1880's) the term was used in connection with procedural due process rights (to criminal indictment) or with fundamental rights (to pursue a lawful profession). Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986). In any case the Supreme Court cited those cases in dicta for a purpose unrelated to determining substantive due process violations. In its discussion of substantive due process protections further on, the Daniels Court cites Rochin, where the Court set forth the "shocks the conscience" standard. Id. In any event, in the very same term the Court recognized that it "has no license to invalidate legislation [under substantive due process] which it thinks merely arbitrary or unreasonable." Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985) (quoting Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 544, 97 S.Ct. 1932, 1958, 52 L.Ed.2d 531 (1977) (White, J., dissenting)); cf. Collins v. City of Harker Heights, Tex., --- U.S. ---, ---, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992) (holding that alleged omission by city could not "properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense"). In Salerno, 481 U.S. at 746, 107 S.Ct. at 2101, decided two years later, the Court made no mention of an "arbitrary" standard in setting out what sort of government actions may constitute a violation of substantive due process rights.

The Court's analysis here apparently is drawn from the Supreme Court's opinion in Ortega-Rodriguez v. United States, --- U.S. ---, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993), rather than from constitutional jurisprudence. The Ortega-Rodriguez Court concluded that, "when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of

connection to the appellate process that would justify an appellate sanction of dismissal." Id. --- U.S. at ----, 113 S.Ct. at 1209. The Ortega-Rodriguez decision, however, was an exercise of the Supreme Court's supervisory power over the lower federal courts and, as no constitutional claims were considered in the case, the rationale of the decision is irrelevant to a proper adjudication of the present case. It is of no consequence to the constitutionality of state procedures that the United States Supreme Court has used its supervisory power to limit the scope of the federal common-law escape rule. "[T]he right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper.... [W]hether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself." McKane v. Durston, 153 U.S. 684, 687-88, 14 S.Ct. 913, 915, 38 L.Ed. 867 (1894). Absent a constitutional violation, the principles of federalism require this Court to accept Missouri's escape rule as formulated by Missouri's courts. See Allen, 166 U.S. at 140-41, 17 S.Ct. at 526-27 ("We might ourselves have pursued a different course in this case, but that is not the test. The [appellant] must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."). Ortega-Rodriguez thus has relevance only to the extent it may influence the Missouri Supreme Court in the exercise of its supervisory authority over Missouri's escape rule. See Robinson v. State, 854 S.W.2d 393, 395 n. 2 (Mo.1993) (en banc) (suggesting the possibility of that court's reviewing Missouri's escape rule in light of Ortega-Rodriguez, but noting the issue had not yet come before it). In the absence of a federal constitutional violation, this Court cannot grant habeas relief. Neither Branch nor the Court has described such a violation. We

must resist the temptation to find in the Constitution a license to write into law our personal vision of how things ought to be. Fidelity to the Constitution demands, among other things, that we scrupulously refrain from asserting powers the Constitution, properly understood, does not give us. I would affirm the District Court's denial of the writ.

Order Denying Rehearing in *Branch v. Turner*, No. 92-3935-WMJC (8th Cir. Sept. 21, 1994)(en banc)

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-3935WM

Lynda Branch,	*	
	*	
Appellant,	*	Order Denying
	*	Petition for
v.	*	Rehearing and
	*	Suggestion for
William R. Turner,	*	Rehearing En Banc
Superintendent, Renz	*	
Correctional Center;	*	
William Webster, Attorney	*	
General of the State of	*	
Missouri,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

On the panel's motion, the attached opinion and dissent containing expanded discussion on pages 4-5 and 9-10 are substituted for the opinion and dissent filed June 28, 1994.

September 21, 1994

Order Entered at the Direction of the Court,

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Conclusion of Volume II of Trial Transcript in *State v. Branch*, No. 30DEC88-120833, Circuit Court of Boone County (Response Exhibit B in *Branch v. Goeke*, No. 91-4433-CV-C-9 (W.D. Mo.)), pages 846-end

(The jury returned into the courtroom at 8:17 p.m. with their verdict. The following proceedings were had:)

THE COURT: Mr. foreman, will you deliver the verdict and the instructions to the bailiff, please.

We, the jury, find the defendant, Lynda Branch, guilty of murder in the first degree as submitted in Instruction No. 5. We assess and declare the punishment at imprisonment for life without eligibility for probation or parole. Signed Robert W. Love, Junior, foreman.

Is this your verdict and so say each member of this jury?

(The jurors responded affirmatively.)

MR. FREER: Ask that the jury be polled, Your Honor.

THE COURT: Virginia Barnes, is this your verdict?

VENIREPERSON BARNES: Yes, Sir.

THE COURT: Kenneth Parsons, is this your verdict?

VENIREPERSON PARSONS: Yes, sir.

THE COURT: Joyce Armontrout, is this your verdict?

VENIREPERSON ARMONTROUT: Yes, Sir.

THE COURT: Robert W. Love, is this your verdict?

VENIREPERSON LOVE: Yes, Sir.

THE COURT: Mary Stanford, is this your verdict?

VENIREPERSON STANFORD: Yes, Sir.

THE COURT: Clare Sutter, is this your verdict?

VENIREPERSON SUTTER: Yes, Sir.

THE COURT: David Swartz, is this your verdict?

VENIREPERSON SWARTZ: Yes, Sir.

THE COURT: Kenneth Penn, is this your verdict?

VENIREPERSON PENN: Yes, Sir.

THE COURT: Tayna Cunningham, is this your verdict?

VENIREPERSON CUNNINGHAM: Yes, Sir.

THE COURT: Helen Shepard, is this your verdict?

VENIREPERSON SHEPARD: Yes, Sir.

THE COURT: Margaret Wohlbold, is this your verdict?

VENIREPERSON WOHLBOLD: Yes, Sir.

THE COURT: Phillip Hase, is this your verdict?

VENIREPERSON HASE: Yes, Sir.

(The Court dismissed the jury.)

(The following proceedings were held in the courtroom outside the presence and hearing of the jury commencing at 8:22 p.m.:)

THE COURT: Do you wish the additional time?

MR. FREER: Yes, Judge.

THE COURT: For good cause shown, defendant granted additional days for a total of 25 days to file Motion for New Trial. Cause set for final disposition at 9:00 a.m. --

April 3rd? Is that agreeable with you? That's a Monday.

MR. FREER: That's fine I'm sure.

THE COURT: If it conflicts with either you or Mr. Callahan, if you will let me know.

MR. FREER: I appreciate that courtesy. Thank you.

THE COURT: 9 a.m., April 3, Division II.

Counsel, let me say to each of you, and I hope you will convey to Mr. Williams what I'm going to say to you, Mr. Freer. I do appreciate the manner in which both sides have conducted yourselves throughout this trial. These types of cases are very difficult, and it's, the attorneys conduct themselves the way that you have done, it's been deeply appreciated by this Court. And I want to say to you particularly, Mr. Freer, not having had you in my court before that you and Mr. Williams have been a pleasure to have here in court. And I hope that I should look forward to perhaps someday seeing you again in some other type of case.

MR. FREER: Thank you, Judge. I would like to say it appreciate the Court's courtesy.

THE COURT: Anything further?

MR. CALLAHAN: No, Your Honor.

MR. FREER: Judge, I would ask she remain on bond until that time.

MR. CALLAHAN: Yes, Sir.

THE COURT: Any statement?

MR. CALLAHAN: No, Your Honor.

THE COURT: All right. The bond will continue as it is until sentencing, and at that time we will take a look at it.

MR. FREER: Thank you, Judge.

THE COURT: Court will be in recess.

(The trial adjourned at 8:25 p.m.)

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Monday, April 3, 1989

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THE COURT: 20833, State versus Branch. Mr. Callahan. Mr. Williams.

MR. CALLAHAN: Good morning.

THE COURT: Where is your client?

MR. CALLAHAN: Good question.

THE COURT: Do you want me to call her name?

Would you call the name Lynda Branch three times, please.

BAILIFF KENNEDY: Yes, Sir.

(Lester Kennedy, Bailiff, left the courtroom to call the name of the defendant.)

BAILIFF KENNEDY: No answer to my call, Judge.

THE COURT: Prosecutor appears. Defendant appears not. Attorney for defendant, John Williams, appears. Attorney for surety --

What's her name?

MR. BRATTON: Her name is Gladys Lett, L-e-t-t.

THE COURT: Gladys Lett, surety, appears by counsel Steve Bratton.

All right.

MR. CALLAHAN: Do you want to argue the Motion for New Trial?

THE COURT: Yes.

MR. WILLIAMS: We noticed it up for today. We would be willing to submit it on the motion that we filed.

MR. CALLAHAN: No argument.

THE COURT: Argument on Motion for New Trial waived. Motion for New Trial and Supplemental Motion for New Trial submitted and by Court overruled.

MR. CALLAHAN: Judge, have you thought any more about which --

THE COURT: No.

MR. CALLAHAN: In that regard, then I would have a motion to file. I can do it here or in the Clerk's office, whatever your pleasure is. The Supreme Court rule is you proceed by motion once you declare the bond forfeiture. I guess I would orally request that you order a bond forfeiture and then I have a motion to file for judgment.

THE COURT: Which I'm sure Mr. Bratton is going to want to set for hearing.

MR. CALLAHAN: I'm sure he is.

MR. BRATTON: I understand you're having a docket October 2d. I heard that mentioned this morning.

THE COURT: Defendant orally -- Strike that. Prosecuting attorney orally moves for bond forfeiture. Same ordered and hearing on motion for judgment of forfeiture set for 9 a.m., May 1, Division II. Okay.

MR. WILLIAMS: Your Honor, I have a Motion to Withdraw.

MR. CALLAHAN: Another thing you might, as I look under the rules, under the Supreme Court rules, the clerk that issues a copy of the motion to the parties --

THE COURT: Which motion are you talking about?

MR. CALLAHAN: I'm talking about the motion for judgment -- even though we're serving them, we've

indicated certificate of service on our motion. I am just submitting that also. I don't know if you, what form your clerk's office operates under. That would be fine. I have extra copies. I'm sure they have a xerox machine.

THE COURT: Okay. All right. Let me get back on the Motion to Withdraw if I may. Any objection to the Motion to Withdraw?

MR. CALLAHAN: I don't think I would have any standing.

THE COURT: I just wanted to know if you have any objection.

MR. CALLAHAN: No.

THE COURT: Does the counsel for surety have any objection?

MR. BRATTON: No.

THE COURT: Attorney for defendant files Motion to Withdraw and leave is granted. Attorneys Williams and Freer to withdraw as attorneys of record for defendant.

MR. WILLIAMS: Your Honor, since it's really not final disposition, would you put you overruled on the Motion for New Trial? And I know there is some case law that since she did not show she's not entitled to appeal. Should we file a notice of appeal just to do that or, I'm asking? I want out of it, but –

THE COURT: I don't know the answer to that question.

MR. CALLAHAN: I would think it would be premature until sentencing under the rules.

MR. WILLIAMS: Well, if we could, if you would not mind putting in that we will file the notice of appeal.

THE COURT: Attorney for defendant orally asks leave to be given permission to file notice of appeal.

MR. CALLAHAN: State is going to file a Motion to Dismiss, so I don't know, I'm not sure how you want to work, over objection of State. I think it's premature at this point.

THE COURT: Attorney given leave to submit such matters as he deems appropriate for ruling by this or other Court as case may require.

MR. CALLAHAN: Okay.

THE COURT: All right. Have I got everything now?

MR. CALLAHAN: I believe so.

MR. WILLIAMS: I think so.

THE COURT: Thank you.

THE COURT: Nice to have you up here, John.

Just a minute, Mr. Callahan, do you want a capias issued?

MR. CALLAHAN: Yes, Sir. I assume, I assume that's part of the forfeiture.

THE COURT: Capias warrant ordered issued for defendant's arrest and placed in hands of sheriff for execution.. Bond on same fixed at --

Do you have a recommendation?

MR. CALLAHAN: I would, I would ask no bond.

THE COURT: Pardon.

MR. CALLAHAN: I would ask no bond at this point.

THE COURT: Bond on same denied pending defendant's arrest.

Mr. Callahan.

(Counsel approached the bench and an off-the-record discussion was held.)

(Hearing adjourned.)

Monday, April 10, 1989

- - -

THE COURT: This is Cause No. 20833, State versus Branch. Mr. Callahan and Mr. Williams.

MR. CALLAHAN: Can we get Mr. Bratton also?

THE COURT: Who?

MR. CALLAHAN: Mr. Bratton. He represents the surety.

THE COURT: Yeah, but where is the attorney for the defendant?

MR. BRATTON: Mr. Williams and Mr. Branch went back to the consultation room.

THE COURT: Then we're not ready. I'm going on to my other docket.

MR. CALLAHAN: There she is now.

MR. BRATTON: Judge, at this time I would like to file the surrender form only for the surety which is now received by the sheriff.

THE COURT: Mr. Williams, are you re-entering your appearance?

MR. WILLIAMS: No, Your Honor, no, I just appear for the purposes of sentencing. I was here last time. Mrs. Branch was not here. And Mr. Callahan called and asked if I would be here for the sentencing. But I do want the Court to show that we have withdrawn. She's filing a notice of appeal on her own signature. And we did prepare a motion affidavit for her to proceed in forma pauperis on the appeal.

THE COURT: Are you appearing for her today?

MR. WILLIAMS: Just for the sentencing, yes.

THE COURT: Prosecutor appears. Defendant appears personally and by counsel, John Williams, for sentencing. Surety appears by counsel.

Mr. Callahan, are you withdrawing your request for motion for forfeiture?

MR. CALLAHAN: Yes, I am, Your Honor.

THE COURT: Motion for forfeiture set aside and Court notes surrender of defendant by surety.

MR. BRATTON: Okay.

THE COURT: Mr. Williams, do you desire to be heard on the motion?

MR. WILLIAMS: Your Honor, on the Motion to Withdraw?

THE COURT: No. On the Motion for New Trial.

MR. WILLIAMS: I thought we did that last time.

MR. CALLAHAN: I think the record will show that's been overruled already.

THE COURT: Mrs. Branch, on April the 3rd the Court took up the Motion for New Trial. And at that time the same was submitted to this Court and was by this Court overruled. The jury in this case having heretofore found you guilty of the offense charged, that is murder, and the only punishment being available being life imprisonment

without benefit of probation or parole, it now devolves upon this Court to impose judgment and sentence in this matter. Is there any statement which you wish to make to the Court prior to imposing judgment and sentence?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: Very well.

THE DEFENDANT: I don't care. I wrote this out but I will just read it to you. First and foremost I will apologize for not appearing on the 3rd. My actions were just due to my confusion and my extreme emotional duress. The sentence the jury recommended was just beyond my comprehension. I still contend that I am not guilty, that I did not deliberately kill my husband, that I acted in self-defense of myself and my child. And I feel that if this Court imposes this sentence on me that it tells all the men that they have the right to assault their wives, beat them, abuse them physically and emotionally and then if the women fight back in any form whatsoever that they're, you know, that they're going to be severely punished even if they try to defend themselves. And I think this is an injustice to everybody, to every woman that's ever been through what I have.

Now, I will take my responsibility for my actions and say that, you know, nobody is any sorrier that he's dead than I am, but I didn't mean to kill him. And I don't think that life without parole is fair to me or my family or any other battered woman. I really don't. I'm under a great deal of emotional pressure right now. And I'm not sure that I can manage through all of this without some help. And I'm going to ask you if you'll consider sending me over to the state hospital for a period of time.

THE COURT: It is the judgment and sentence of this Court that you be confined in an institution to be designated by the director of the Department of Corrections for the remainder of your natural life without benefit of parole. Allocution, judgment, and sentence. Sheriff authorized one deputy. Judgment, Crime Victims Compensation Fund. Defendant to receive credit for jail time and prison time served to date. Attorney for defendant, John Williams, given leave to withdraw as attorney for defendant on conclusion of these proceedings. Defendant authorized to proceed in forma pauperis on appeal.

Mr. Callahan, you have no objection to that, do you?

MR. CALLAHAN: Not to the finding of in forma pauperis, no, Your Honor.

THE COURT: State public defender requested to assign counsel to represent defendant on direct appeal and on any post-conviction motion which may be filed.

Now, Ms. Branch. I'm required by rule of the Supreme Court, specifically Rule 29.15, at this time to advise you of certain rights which you have which we call post-conviction rights. You must file any Motion to Vacate this sentence within 30 days of the transcript on appeal being prepared and filed with the appropriate appellate court which I suspect in this case would be the Kansas City Court of Appeals, would it not?

MR. WILLIAMS: Yeah.

THE COURT: So when that transcript is filed with that Court, you must file any Motion to Vacate within 30

days after that time. That motion may raise the following matters: No. 1, that the Court was without jurisdiction to hear your case; No. 2, that the Court imposed a sentence greater than that authorized by law; or No. 3, that some other Constitutional right has been violated. I am also required although Mr. Williams is withdrawing from your case, to make a record with you at this time as to whether you are satisfied with the way in which Mr. Williams and Mr. Freer have represented you in this case. And in that regard, if there is something that you would prefer to say to me outside of their hearing, I will excuse Mr. Williams from the courtroom and give you that opportunity. Do you want Mr. Williams to leave the courtroom?

THE DEFENDANT: Yeah.

MR. WILLIAMS: Your Honor, I will just leave this notice of appeal for the clerk. She also asked me that I ask after she's sentenced if she could have about ten or fifteen minutes with her daughter and foster mother.

THE COURT: All right.

(Mr. Williams left the courtroom.)

THE COURT: Now Ms. Branch, is there something you wish to tell me about your representation that you would prefer to say outside Mr. Williams' hearing.

THE DEFENDANT: Yes.

THE COURT: Now you understand that you do not have the benefit of counsel at this time?

THE DEFENDANT: Yes, sir, I understand.

THE COURT: In that regard because of the nature of this offense, I'm going to ask the local public defender, Mr. Rosenswank, to stand with you during these proceedings in order that he can advise you in any way.

Now, what is it that you wish to tell me with regards to your representation?

THE DEFENDANT: Okay, I asked Mr. Williams and Mr. Freer to present certain pieces of evidence that they refused to submit. I also asked them to put another witness on the stand that they wouldn't. And if you'll recall on the day of the trial when I said I wanted to retake the stand and they took me out back and told me I couldn't and everything else. I couldn't say anything with Mr. Williams here because they were defending me, I wasn't going to say anything against them at that time. But I feel that they did not properly represent me in any matter, respect or form. They didn't adhere to my wishes. And one of the reasons I won my appeal was off a particular piece of evidence that I asked them to introduce. And they were, I guess, afraid to introduce it because of something that was in it. But, you know, it was there. It would have proven beyond any reason that he had put me in intensive care. And I think that would have been, that would have been helpful to the jury. And I think the jury would have maybe understood a little bit better.

THE COURT: Let the record reflect that outside the presence of counsel but with the local public defender, Mr. Rosanswank, present, Mrs. Branch articulates reasons that she believes that she was not properly represented during the course of her trial. The Court notes those reasons and because counsel has been given leave to withdraw makes no

finding as to whether there was effective assistance of counsel in this particular case.

Anything further?

Now, Mr. Callahan, any objection to her having an opportunity to visit with her daughter?

MR. CALLAHAN: No, Your Honor.

THE DEFENDANT: Thank you.

THE COURT: On oral request of defendant, sheriff to permit visitation for period not to exceed thirty minutes with defendant's daughter prior to transfer to Missouri Department of Corrections.

THE DEFENDANT: Excuse me, judge, can my foster mother see me, too, at the same time? I only need to see her for about five minutes since she has guardianship of my daughter.

THE COURT: With defendant's daughter and foster mother.

THE DEFENDANT: Okay. Thank you.

THE COURT: Mr. Rosanswank, I don't know which one of you all is going to get into this, whether you or Mr. Catlett are going to be involved in this case. I don't know how the State -- that's why I entered the order this way.

MR. ROSENSWANK: Probably the State office will do the appeal, Judge, and we will end up doing the PCR. That's what I would anticipate.

Judge, would it be appropriate for the Court to set an appeal bond in some amount at this time?

THE COURT: Any statement?

MR. CALLAHAN: We would oppose the setting of any appeal bond.

THE COURT: Defendant orally moves for appeal bond. Said request is denied. All right.

MR. CALLAHAN: Thank you.

(Hearing adjourned.)

Findings of Fact and Conclusions of Law in *Branch v. State*, No. 89CC034522, Circuit Court of Boone County (Apr. 20, 1990)

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

LYNDA RUTH BRANCH, Movant,	)	
vs.	)	No. 89-CC0-34522
STATE OF MISSOURI, Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

On the 9th day of February, 1990, comes the above-entitled cause for hearing. Movant was present in person and by his counsel, Joel R. Elmer. The state was represented by Assistant Prosecuting Attorney Patricia S. Joyce. The following findings of fact and conclusions of law are hereby made:

1) On March 3, 1989, Movant was convicted of capital murder. The jury assessed a sentence of life imprisonment without eligibility of probation or parole. Movant was sentenced on April 10, 1989, by the Circuit Court of Boone County, Missouri.

2) Movant filed a pro se motion for relief under Supreme Court Rule 29.15. On October 3, 1990, an amended motion was filed.

3) Movant has alleged that trial counsel was ineffective for various reasons. One contention is that counsel was ineffective for failing to admit movant's Exhibit 5 at the trial. This exhibit is a medical record from St. Mary's Medical Center dated April 24, 1978. The record pertains to injuries that the movant sustained. Also, contained therein is the statement that the movant attributed the injuries to a beating by the deceased. The record also refers to two abortions and four caesarean sections. Additionally, the report indicates that six of the children had died at various times.

Mr. James Freer, trial counsel for movant, testified that he had considered introducing movant's Exhibit 5 and had discussed the evidence with his co-counsel and his client. He stated that it had been a matter of trial strategy not to admit the exhibit. One reason is that the exhibit contradicted the battered woman's syndrome as proposed by the movant's expert witness, Dr. Daniels. The medical record identifies tho perpetrator as the deceased, movant's husband. One of the main propositions of the syndrome is that the battered wife will not disclose her husband as being the batterer out of fear and also to protect the family unit.

Additionally, Mr. Freer stated that he was afraid that the medical record may have opened up the question of the deaths of movant's children. He stated that he wished to keep that information from the jury because he was not comfortable with his client's explanation. Cyril Hendricks, former counsel of movant, stated that he had serious concerns if the issue of tho children's deaths were opened up at trial.

Mr. Freer explained that he talked with co-counsel, Mr. Williams, and movant concerning whether the exhibit

should be introduced into evidence. Mr. Williams initially felt that the exhibit should be admitted but later agreed with Mr. Freer. He related that his client reluctantly agreed to keep that exhibit out of evidence.

Mr. Williams testified that there were discussions over several days about whether to introduce the exhibit. He eventually concurred with the decision of Mr. Freer to exclude the exhibit as a matter of trial strategy.

This Court finds that the decision to exclude the movant's Exhibit 5 was a decision made by movant. Additionally, it was 8 matter of trial strategy to exclude it within the province of a decision by defense counsel. Berry v. State, 714 S.W.2d 676 (Mo.App. 1986).

Movant's exhibit 5 would have been cumulative evidence to other evidence that had been presented at trial. Defendant's Exhibits 1 (T.p. 528); 2 (T.p. 529); 3 (T.p. 543); 4 (T.p. 544); 6 (T.p. 554); and 7 (T.p. 556) all pertain to injuries that movant allegedly sought medical treatment as a result of injuries she sustained from Raymond.

For the above-stated reasons, this issue is found against movant.

4) Movant has further alleged that trial counsel was ineffective for failing to call Bonnie Gill as a witness. At this hearing, Mrs. Bonnie Gill Basham testified that she had been a neighbor of the Branches when they had lived in the housing projects in Jefferson City. She related that she would hear arguments at the Branch home. Linda would emerge crying and Raymond would leave to go to his brother's house who lived nearby. She did not know when the Branches lived near her. She further related that she

has not gone by the name of Bonnie Gill for at least ten years.

The investigator for trial counsel stated that he was unable to locate Bonnie Gill since he had no known address for Ms. Gill. He also was advised that she had married someone named "Lightening" and had no way of locating him.

The Court finds that trial counsel exercised due diligence in trying to locate Mrs. Gill-Basham. Counsel cannot be expected to find a witness where there is no current address, location or name for the witness.

Additionally, the testimony of Mrs. Gill-Basham would only have cumulative to the similar testimony presented by Sandy Holzer, Shirley Long, Gladys Lett and Tamara Lynn Hoerschgen. State v. Dutton, 670 S.W.2d 599 (Mo.App. 1984). Movant has failed to prove that counsel was ineffective for not calling Mrs. Gill-Basham.

5) Movant has also alleged that counsel was ineffective for failing to call Linda Son, Donna Son, Mark McCallister. and Linda Wilkerson. No evidence was presented as to what their testimony would have been. Accordingly, these issues are found against movant.

5) [*sic* for '6)'] Movant has also alleged that counsel was ineffective for failing to call Peggy Williams to testify. Ms. Williams testified at this evidentiary hearing that she had been the probation officer for the movant between the years of 1979 and 1984. She testified that movant had complained of the problems she was having with Raymond. Ms. Williams testified that she had responded at one time to a police call in the housing projects where movant was

nervous and crying. Ms. Williams also testified that Lynda had told her that Raymond had beat her. Ms. Williams stated that she never saw Lynda with a black eye, and she could not remember if she ever saw her bruised.

Ms. Williams recollected that she was contacted by the investigator for trial counsel prior to the trial. She had advised that she could only remember bits and pieces of her relationship with Ms. Branch since she did not have access to her field notes from probation and parole. She also advised the investigator that she may have had some damaging testimony that would injure Mrs. Branch's case.

Ms. Williams testified that she was on maternity leave from her Job between February 17 and March 23, 1989. She stated that her office could reach her at home.

Mr. McCallister, investigator for trial counsel, testified that he had contacted Ms. Williams prior to trial concerning her testimony. He related that information to Mr. Williams, trial counsel. When he attempted to obtain service on her, she was on maternity leave and could not be reached by telephone.

Mr. Williams testified that he had discussed Ms. Williams' testimony with Mr. McCallister. Since they could not locate her and her testimony could be potentially damaging, Mr. Williams decided to forego her testimony. Her testimony is also cumulative to testimony presented by Sandy Holzer, Shirley Long, Gladys Lett and Tamara Lynn Hoerschgen.

This court finds that counsel could not locate the witness. Additionally, her testimony was cumulative to the other witnesses. Trial counsel cannot be faulted for not

putting on cumulative testimony that is fraught with dangers. State v. Dutton, 670 S.W.2d 599 (Mo.App. 1984).

This issue is decided against movant.

7) Movant has further alleged that trial counsel was ineffective for not calling Regina McGee as a witness to physical abuse. Ms. Wilma Regina McGee testified that she had been a babysitter for Lynda and Raymond Branch during a one-year period. She stated that she would stay at the Branch home for the weekend. At first, she testified that it would be every weekend. She later changed her testimony that it was a couple of weekends per month.

Ms. McGee testified that she was present at the home when Lynda Branch was hit by Raymond Branch. She testified initially that Raymond threw a phone at Lynda and Lynda had passed out. She then left the room with the children and then saw Lynda Branch being pushed against the cabinet. Only on cross-examination did she state that she re-entered the room to see Lynda being pushed into a cabinet. Under cross-examination she stated that was the only time when she saw any physical violence. She stated that they would argue and she would leave the room with the children. Ms. McGee was not sure of the year or the time span when she babysat. Given Ms. McGee's inability to remember years or details and her changing the story upon examination, this Court finds her testimony wholly incredible and unworthy of belief. She clearly appeared to be making up events as the questioning proceeded.

Mr. McCallister testified as to his efforts to locate Ms. McGee. He stated that he had her parent's names and the belief that they had lived in Holts Summit. He stated that he contacted the phone directory in the attempt to

locate the McGees. He did not have any success either in Holts Summit or tho Jefferson City area. Additionally, he contacted the Director of Revenue to ascertain whether she had a driver's license. She did not have a driver's license. Mr. McCallister stated that he did not have any further information find could not contact her.

Ms. McGee related that she had lived in Taos, Missouri, on a road known as Stoney Gap. She related that she had married but did not take her husband's name of Cochran. She stated that she does not have a phone in her own name but that her fiance currently does. Ms. McGee stated that her parents had moved four or five times in the last three years. She believed that they may have been living on High Street, Jefferson City, Missouri, in March 1989.

The Court finds from the evidence that trial counsel exerted every reasonable effort to locate McGee. It would have been impossible to locate a witness with no phone or address listing. Accordingly, it was not ineffective assistance of counsel to fail to call Regina McGee. This issue is found against movant.

8) Movant has further alleged that counsel was ineffective for failing to call Louise Bauschard as an expert in the battered woman syndrome. At trial, counsel called Dr. A. E. Daniels, a licensed psychiatrist and superintendent of the Mid-Missouri Mental Health Center. Dr. Daniels explained to the jury the battered woman syndrome. An examination of the movant was done by Dr. Daniels, and he concluded that she did suffer from the battered woman's syndrome (T.p. 737). His description of the syndrome was detailed and exhaustive.

Ms. Bauschard testified at this hearing concerning her qualifications as an expert. She is a social worker with a master's degree and five years post graduate education. Her main emphasis has been on battered women. She testified that, based on her experience and knowledge, Dr. Daniel's testimony was accurate. She further testified that she and members of her organization had paid some funds to the defense to assist in the investigation of the case. She had recommended Dr. Daniels as an expert to examine movant. She assisted the defense attorneys in preparing for trial by recommending books to be read and answering their questions. She testified further that additional testimony on the battered woman's syndrome would have aided the jury.

Mr. Freer testified that he never considered using Ms. Bauschard as an expert witness since they had Dr. Daniels. Ms. Bauschard did not inform the defense counsel that she could be called as an expert until after trial had commenced. Ms. Bauschard was a spectator at the trial. The rule to exclude witnesses had been invoked. Mr. Freer testified that he considered Ms. Bauschard as a resource person since she or her organization had provided funding and information.

This Court finds that the testimony of Louise Bauschard would have been cumulative to the testimony of Dr. Daniels. Clearly, from the evidence presented at this hearing and at trial, Dr. Daniels was more qualified to testify as to the syndrome and the effects on movant. The testimony concerning the syndrome was no more difficult to understand than testimony concerning a firearms examination which this jury heard. Counsel cannot be deemed ineffective for failing to put on cumulative evidence. State v. Dutton, 670 S.W.2d 599 (Mo.App. 1984).

9) Movant next complains that counsel was ineffective for failing to object to closing argument by the state concerning movant's plans to move the body. No evidence was presented on this issue, and it is found against movant.

10) Movant claims that counsel was ineffective in failing to pursue a plea bargain of involuntary manslaughter. Mr. Freer, as well as Mr. Hendricks, her previous counsel, pursued a plea bargain of involuntary manslaughter which was rejected by the Prosecuting Attorney. This issue is found against movant.

11) Movant has further alleged that counsel was ineffective for submitting the motions to suppress evidence and statements as previously ruled by another court. No evidence was presented on this issue, and it is found against movant.

12) Movant has alleged that the court erred in overruling motion for acquittal because of insufficient evidence. This issue was decided after consideration by the trial and that decision is affirmed. This issue is found against movant.

13) Movant has alleged that the court erred in failing to sustain the motion to suppress the statements. This issue was decided after consideration by the trial and that decision is affirmed. The issue is found against movant.

14) Movant has alleged the motion to suppress evidence. This issue was decided against movant by this court. This issue is found again against movant.

15) Movant has alleged that the trial court erred in allowing the admission of the white sheet. This issue was decided against movant in tho motion for new trial. This issue is found against movant.

16) Movant has alleged that the trial court erred in failing to allow Movant to introduce the copy of the dissolution petition filed by Pam Beaufort. This issue was decided against movant in the motion for new trial and is found against the movant.

17) Movant has alleged that the trial court erred in allowing the testimony of Craig Faith as to the condition of the body. This issue is raised in the motion for new trial and was overruled. It is again decided against movant.

18) Movant has raised the issue of the introduction of photographs of the victims and the displaying of the photographs in the courtroom. This issue was decided against movant in the motion for new trial and it is ruled the same.

19) Movant has alleged that the court erred in the introduction of a photograph of clothes in a washing machine. This issue was raised and overruled in the motion for new trial. It is again decided against movant.

20) Movant has alleged that the court erred in allowing the admission of instructions A, B, C, D and E. This issue was decided against movant in the motion for new trial and is decided against movant.

21) Movant has contended that the court erred in not allowing the jury to consider the offers of proof by Dr.

Daniels. This issue was also raised in the motion for new trial and is found against movant.

22) Movant has raised the issue that improper communication occurred between Judge Thomas Brown and this court. The issue was decided against movant in the motion for new trial and is overruled.

23) Movant has alleged that new evidence has been uncovered which would substantiate her history of abuse. No evidence was presented on the issue and it is found against movant.

ORDER

After considering all of these issues, this motion pursuant to Missouri Supreme Court Rule 29.15 is found against movant.

s/Frank Conley
Judge of the Circuit Court

Judgment Denying Motion for State Post-Conviction Relief in *Branch v. State*, No. 89CC034522, Circuit Court of Boone County (Apr. 20, 1990)

NOTICE OF ENTRY OF ORDER OR JUDGMENT
(TO BE GIVEN BY CLERK
TO ALL PARTIES NOT IN DEFAULT
WHO ARE NOT PRESENT IN OPEN COURT
WHEN ORDER OR JUDGMENT IS ENTERED)
(Supreme Court Rule 74.78)

STATE OF MISSOURI)
) ss.
COUNTY OF BOONE)

IN THE CIRCUIT COURT
WITHIN AND FOR THE COUNTY OF BOONE,
STATE OF MISSOURI

LYNDA RUTH BRANCH
Plaintiff/Petitioner

vs. No. 89CC034522

STATE OF MISSOURI
Defendant/Respondent

TO FILE COPY

YOU ARE HEREBY NOTIFIED that on 4-20-90
The Honorable FRANK CONLEY entered the following order:

04/20/90 MOTION TO VACATE DENIED AS PER FINDINGS OF FACT & CONCLUSIONS OF LAW. FC

MAXINE OWENS
Clerk of the said Court

By: s/Margaret Thomas
Deputy

Said notice was mailed on 04/20/90 to:
JOEL ELMER
RICHARD CALLAHAN

5/1/90 Court of Appeals

Opinion of the Missouri Court of Appeals, Western District, in *State v. Branch*, Nos. WD 41852 & WD 43416, as reported at 811 S.W.2d 11 (Mo. Ct. App. 1991)

State of Missouri, Respondent,

v.

Lynda R. Branch, Appellant.

Nos. WD 41852, WD 43416.

Missouri Court of Appeals,
Western District.

April 30, 1991.

Before SHANGLER, P.J., and KENNEDY and FENNER, JJ.

SHANGLER, Judge.

The defendant Lynda Branch was charged with first degree murder, convicted by a jury, and sentenced to a term of life imprisonment without possibility of parole for fifty years. That conviction was reversed and the cause remanded for a new trial. State v. Branch, 757 S.W.2d 595 (Mo.App.1988). The venue was changed to Boone County upon the remand, the cause was retried to a jury, and the defendant Lynda Branch was again convicted of first degree murder, and sentenced to a term of life imprisonment without possibility of parole for fifty years.

The defendant filed a notice of appeal of the conviction and, then conformably with the procedures of Rule 29.15, brought a post-conviction motion to set aside the conviction and sentence, and appealed the order that denied relief.

Those appeals were consolidated for our review.

The State moved to dismiss appeal in this court on the ground that by her escape from lawful custody and disobedience to the orders of the court, the defendant forfeited any right to call upon that same court for redress in the same cause. The defendant had been released by the trial court on a $100,000 surety bond pending trial. One of the conditions for release was that the accused obey the orders of the court to appear. Rule 33.01. She failed to appear as ordered for sentencing on April 3, 1989, and the prosecutor moved for forfeiture of the bond. The hearing on the motion was scheduled for May 1, 1989, and the court directed that a capias warrant issue to the sheriff for the defendant's arrest. She was found in Moniteau County on about April 6, 1989, and returned to Boone County. She was brought before the court on April 10, 1989, and sentenced to a term of life imprisonment without possibility of parole.

We took the motion to dismiss the appeal with the case, received the briefs of counsel, heard oral argument, took the case under submission, and now order that the appeal from the conviction, as well as the appeal from the post-conviction order, be dismissed.

The escape rule operates to deny the right of appeal to a defendant who, following conviction, attempts to escape justice. State v. Wright, 763 S.W.2d 167, 168

(Mo.App.1988). The principle was first given effect in State v. Carter, 98 Mo. 431, 11 S.W. 979 (1889) and has since become entrenched in our criminal jurisprudence. It has been supported by rationales as diverse as the circumstances that gave necessity to its operation. State v. Wright, 763 S.W.2d at 169. In the case of a convicted defendant who escaped during appeal, the dismissal was justified by the need of the court to control the defendant before rendering the decision on appeal. A convicted defendant could not be allowed to remain out of the reach of justice, and to decide to return to the control of the court only after an acquittal by the appeal decision. State v. Carter, 11 S.W. at 980.

In the case of a convicted defendant in custody at the time of appeal, but after a five-year escape between conviction and sentencing, the dismissal was justified by the administrative problems and prejudice to the state caused by prolonged absence. State v. Kearns, 743 S.W.2d 553, 554 (Mo.App.1987).

In the case of an escaped convicted defendant in custody at the time of appeal, but only after a five-month escape between conviction and sentencing, and even in the absence of prejudice to the state, the dismissal was justified by a more fundamental principle: preservation of public respect for our system of law. "Those who seek the protection of this legal system must ... be willing to abide by its rules and decisions." State v. Wright, 763 S.W.2d at 108; Stradford v. State, 787 S.W.2d 832, 833[2, 3] (Mo.App.1990).

The defendant argues that a substantive review on the merits of her appeal would foster a greater respect for the law than the peremptory dismissal of the appeal under

the principle of Wright, especially since the absence from custody was only for a brief three days. Wright transliterates into pith what the United States Supreme Court already spoke:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicible case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

Molinaro v. New Jersey, 396 U.S. 365, 366, 90 S.Ct. 498, 500, 24 L.Ed.2d 586 (1970).

It is the escape and not the lapse of days the escape measures that operates to disentitle the right of appeal under Molinaro and Wright.

In State v. Schleeper, 806 S.W.2d 459 (Mo.App.1991), the convicted defendant was recaptured and returned to the custody of the court two days after escape. In consequence, the appeals from both the conviction and the denial of post-conviction remedy were dismissed. See also Stradford v. State, 787 S.W.2d 832 (Mo.App.1990).

The appeals in State v. Branch, No. WD 41852 and Branch v. State, No. WD 43416 are dismissed.

All concur.

Application for habeas corpus in *Branch v. Goeke*, No. 91-4433-CV-C-9 (W.D. Mo. Sept. 16, 1991)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

LYNDA BRANCH, #3699 Renz Correctional Center P.O. Box 28 Jefferson City, MO 65102 Petitioner, vs. WILLIAM R. TURNER, Superintendent Renz Correctional Center Jefferson City, MO 65102 Respondent; and WILLIAM WEBSTER, Attorney General of the State of Missouri Jefferson City, MO 65101 Additional Respondent.)	)	Case No. 91-4433-CV-C-9

APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner, Lynda Branch, by and through counsel, Cyril M. Hendricks, and for her

Application For Writ Of Habeas Corpus states to the court as follows:

1. Name and location of court which entered judgment under attack: The Petitioner was convicted by the Circuit Court of Boone County, Missouri, located in Columbia, Missouri on March 3, 1989 and sentenced on April 10, 1989. A timely appeal was perfected together with a post-conviction motion pursuant to Rule 29.15. The motion under Rule 29.15 was found against Movant by the Circuit Court of Boone County. The appeal from the conviction and Rule 29.15 decision was consolidated for review by the Missouri Court of Appeals, Western District. The Nissouri Court of Appeals, Western District, dismissed the appeals in State vs. Branch, No. WD41852 and Branch vs. State, No. WD43416 pursuant to a Motion To Dismiss appeal filed by the State on the grounds that by her escape from lawful custody and disobedience to the orders of the Court, the Movant forfeited any right to appeal.

2. Date of judgment of conviction: The Petitioner was convicted by the Circuit Court of Boone County, Missouri on March 3, 1989.

3. Length of sentence: The Petitioner was sentenced by the Circuit Court of Boone County to life imprisonment without possibility of parole for fifty years.

4. Nature of offense involved: The Petitioner was convicted of first degree murder.

5. What was your plea? The Petitioner plead not guilty to the charge.

6. Kind of trial: Jury.

7. Did you testify at the trial? Yes.

8. Did you appeal from the judgment of conviction? Yes.

9. If you did appeal, answer the following:

a. Name of court: Missouri Court of Appeals - Western District, Case No. WD41852 and Case No. WD43416.

b. Result: Petitioner's appeals were dismissed, State vs. Branch, 811 S. W. 2d 11 (Mo. App. 1991).

c. Date of result: April 30, 1991.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previous filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes.

11. If your answer to l0. was "Yes", give the following information:

a. (1) Name of court: Circuit Court, Boone County, Missouri; Missouri Court of Appeals - Western District.

(2) Nature of proceeding: Rule 29.15 Motion to Vacate Judgment and Sentence.

(3) Grounds raised: 1. Effective assistance of counsel; 2. Trial Court erred in overruling Motion For Judgment Of Acquittal At Close Of State's Case and At Close of All Evidence; 3. Trial Court improperly introduced evidence; 4. Trial Court failed to sustain

Motion to Suppress filed by Movant; 5. Trial Court erred in refusing to give instructions tendered by Movant. That the trial court erred in denying post-conviction relief, and in finding that Petitioner was not denied effective assistance of counsel or his right to a fair trial and due process, and that the trial court was without jurisdiction in that the State improperly filed an amended affidavit changing the charge from felony murder to conventional murder.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes.

(5) Result: Denied.

(6) Date of result: February 9, 1990.

b. As to any second petition, application, or motion, give the same information: No.

c. As to any third petition, application, or motion, give the same information: No.

d. Did you appeal to the highest state court having jurisdiction, the result of action taken on any petition, application, or motion?

(1) First petition? No.

(2) Second petition? Not applicable.

(3) Third petition? Not applicable.

e. If you did not appeal from the adverse action on any petition, application, or motion, explain briefly why you did not:

(1) Public Defender would not represent Movant

(2) Not applicable.

(3) Not applicable.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

The Petitioner was convicted on March 3, 1989 on one count of first degree murder, Section 565.020 RSMo. 1986, in the Boone County Circuit Court, the Honorable Frank Conley, Judge. She failed to appear as ordered for sentencing on April 3, 1989 and the Court directed a capias warrant for her arrest. She was found in Moniteau County, Missouri on April 6, 1989 and returned to Boone County. She was brought before the Court on April 10, 1989 and sentenced to a term of life imprisonment without possibility of parole. A Notice of Appeal was filed to the Missouri Court of Appeals, Western District, on April 10, 1989. On August 4, 1989, Petitioner filed a Rule 29.15 motion for post-conviction relief. Following an evidentiary hearing held on February 9, 1990, the Court denied the post-conviction motion on April 20, 1991. On May 25, 1990, the Appellant filed a Notice of Appeal of the Order denying her post-conviction relief.

The appeals were consolidated for review by the Missouri Court of Appeals, Western District. A Motion to

Dismiss was filed by the State on the ground that her escape from lawful custody and disobedience to the Orders of the Court forfeited any right she had to appeal. The Motion to Dismiss was taken with the case. Briefs were received by the Court, oral arguments heard, and the Court of Appeals on April 30, 1991, ordered that the appeal from the conviction, as well as the appeal from the post-conviction order, be dismissed. See: State vs. Branch, 811 S. W. 2d 11 (Mo. App. 1991) .

Petitioner claims she is being held unlawfully because:

a. The Petitioner was denied due process of law and equal protection of law by the Order of the Court of Appeals, Western District, dismissing her appeal from the conviction, as well as the appeal of the post-conviction order, because:

(1) At the time of the filing of both appeals, she was in lawful custody and she had complied while in custody with all the statutory requirements for filing a criminal appeal under the statutes and rules of the State of Missouri.

(2) The Petitioner did not escape from custody. The failure to appear as ordered for sentencing on April 3, 1989 did not constitute escape from custody.

(3) Neither the State nor the courts were prejudiced by the absence of the Petitioner from the jurisdiction of the Court for the three day period from April 3, 1989 to April 6, 1989, nor was the appellate process delayed in any manner.

(4) The Order of the Court of Appeals denies the Petitioner of a fair trial because the Motion For A New Trial and the Order denying post-conviction relief was never reviewed on the merits by an Appellate Court. Grounds 12 (c) - (p) were presented in the Motion for New Trial but not reviewed by the Appellate Court.

b. Movant was denied her right to effective assistance of counsel guaranteed her by the United States Constitution because:

(1) Counsel failed to offer into evidence at trial hospital records from St. Mary's Hospital, Jefferson City, Missouri, resulting from a beating of Movant by her husband with a telephone receiver, which evidence would have been relevant to a claim of self-defense or accident and to the degree of homicide, if any, of which Movant was guilty.

(2) Counsel failed to offer at trial the testimony of certain witnesses, whom Movant wanted to testify at trial and had so advised counsel of that fact, what she believed they would testify to, and their names and other identifying information, including places of employment, addresses, names and addresses of relatives, telephone numbers, or other information sufficient to enable counsel to offer such evidence. Those witnesses included:

(i) Linda Son, who would have testified to physical abuse of Movant by Movant's husband, including but not limited to an incident in which Movant's husband beat Movant and aimed a gun at Movant.

(ii) Mark McCallister, an investigator, who would have testified that he interviewed Linda Son and she informed him of her above knowledge.

(iii) Donna Son, who would have testified to physical abuse of Movant by Movant's husband, including the above incident to which Linda Son would have testified.

(iv) Bonnie Gill, a neighbor who would have testified to physical abuse of Movant by Movant's husband and to having had to telephone the police to have them respond to the scene of such abuse.

(v) Linda Wilkerson, who would have testified to physical abuse of Movant by Movant's husband and to Movant's physical appearance after such beatings.

(vi) Peggy Williams, at one time Movant's probation officer, who would have testified to physical abuse of Movant by Movant's husband and to Movant's resulting fear of her husband.

(vii) Regina McGee, a babysitter, who would have testified to physical abuse of Movant by Movant's husband.

(viii) Louise Bauschard, at one time the director of Women's Self-Help Center, St. Louis, Missouri, who would have qualified as an expert and would have testified as to the battered woman syndrome.

(3) Counsel failed to object to the prosecuting attorney's improper closing argument regarding Movant's possible plan to dispose of her husband's body, which

argument was not supported by the evidence and which improperly inflamed and prejudiced the jury.

(4) Counsel failed to attempt to negotiate with the prosecuting attorney prior to trial a plea bargain agreement whereby Movant would have pleaded guilty to involuntary manslaughter, even though Movant had so instructed counsel.

(5) As to pretrial motions, including Movant's Motion to Suppress Evidence and Motion to Suppress Statements, Movant's counsel stipulated that the Court in this cause would rerule those motions, i.e. overrule them, in accordance with the rulings in a prior trial of this cause in Circuit Court of Cape Girardeau Case No. CR386-17F without requiring this Court to itself consider the evidence previously presented and legal issues raised and without again presenting the evidence to this Court or adducing additional evidence.

c. The Court erred in overruling Movant's Motion for Judgment of Acquittal at the close of the State's case because the evidence was not sufficient to sustain a conviction. Either no evidence or insufficient evidence was introduced that Movant knowingly, and after deliberation, caused the death of Raymond E. Branch.

d. The Court erred in overruling Movant's Motion for Judgment of Acquittal at the close of all evidence because the evidence was not sufficient to sustain a conviction.

e. The Court erred in failing to sustain the Motion to Suppress Statements made by Movant prior to her being given the Miranda warnings and any statements made prior

to the warning because they were not freely and voluntarily given.

f. The trial court erred in failing to sustain the Motion to Suppress Evidence filed by and submitted upon the testimony at the last trial.

g. Movant objected to the admission of the white bed sheet found in her basement by a third party approximately one week after the initial arrest. Movant contends that said sheet was seized and obtained through an unlawful and illegal search.

h. The Court erred in failing to allow Movant to introduce a copy of the dissolution petition filed by Pam Beaufort.

i. The Court erred in allowing the testimony of Craig Faith, ambulance attendant from Charles E. Still Hospital, over the objection of Movant, as it pertained to certain opinions given by him dealing with the condition of the body and the length of the time that the person had been dead. It was error for the Court to allow the testimony for the following reasons that Craig Faith was not properly qualified as an expert to testify as to the length of time of death or the fact that the victim was in fact dead. No evidence was presented that he possessed the necessary medical or scientific knowledge and training in order to give an opinion on this subject. This person should not have been allowed to express an opinion on these issues.

j. The Court erred in allowing to be shown to the jury, over objection, certain photographs of the victim because the photographs had no probative value, were

highly inflammatory, gruesome and were shown for the purpose of arousing the passion of the jury.

k. It was error to the Court to allow the photographs to remain exhibited in the Courtroom, after requested by Movant to remove them after their initial showing to the jury.

l. It was error for the Court to allow photographs of clothes on the washing machine into evidence because the testimony was that the clothing had been removed and then replaced prior to the photographs being taken.

m. The Court erred in refusing to give Instructions A, B, C, D, and E which Instructions were requested by Movant.

n. The Court further erred by not allowing into evidence before the jury the offers of proof tendered by Movant as to questions asked of Dr. Daniel, as to his opinion as to whether or not at the time of shooting, he believed Lynda Branch to have acted in self-defense, that her perception of danger was affected by her status as a battered woman, and as to why she would have given a false statement to the police as to how the shooting occurred, and behaved as she did following the shooting. The denial of such testimony prevented the jury from understanding the concept of self-defense as it applies to this particular Movant, in light of the incidents of battering to her by the victim.

o. The Court erred and Movant was prejudiced by communications had during the trial between this Honorable Court and the Honorable Tom Brown, who prosecuted this action at the first trial.

p. New evidence has been discovered further substantiating the history of abuse of Movant by Movant's husband including testimony of additional witnesses who can testify to such, which evidence was not known to Movant at the time of trial and could not have reasonably been expected to be discovered by her previously.

13. If any of the grounds listed in 12. were not previously presented in any other court, state or federal, (state briefly what grounds were not presented, and give your reasons for not presenting them: All grounds were raised in the Motion For New Trial and Motion Under Rule 29.15 except the grounds of the Court of Appeals dismissing the appeals.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No.

15. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

a. At preliminary hearing: John Williams and James Freer, Flat River, Missouri 63601.

b. At arraignment and plea: John Williams and James Freer, Flat River, Missouri 63601.

c. At trial: John Williams and James Freer, Flat River, Missouri 63601.

d. At sentencing: Jeff Rosanswank, Columbia, Missouri 65201.

e. On appeal: John A. Klosterman, Columbia, Missouri 65201.

f. In any post-conviction proceeding: John A. Klosterman, Columbia, Missouri 65201.

g. On appeal from any adverse ruling in a post-conviction proceeding: John A. Klosterman, Columbia, Missouri 65201.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? No.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

WHEREFORE, the Petitioner, Lynda Branch, prays for an order of this court granting her such relief as she may be entitled in this proceeding.

Respectfully submitted,
HENDRICKS & SMITH

s/C.M. Hendricks
Cyril M. Hendricks, #19881
301 E. McCarty Street
Jefferson City, MO 65101
314/635-9200
Attorney for Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 9/10/91

s/Lynda Branch
Lynda Branch, Petitioner

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

Now on this 10 day of September, 1991, before me, the undersigned Notary Public, personally appeared Lynda Branch, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that she executed the same for the purpose herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last above written.

s/Earl D. Engelbrecht
Notary Public

My Commission expires:

EARL D. ENGELBRECHT, NOTARY PUBLIC
STATE OF MISSOURI, COLE COUNTY
My commission expires April 6, 1993

Response to Show Cause in *Branch v. Goeke*, No. 91-4433-CV-C-9 (W.D. Mo. Sept. 16, 1991)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

LYNDA R. BRANCH, Petitioner,	)	
v.	)	No. 91-4433-CV-C-9
WILLIAM R. TURNER, et al., Respondents.	)	

RESPONSE TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED

COMES NOW the named respondents, William R. Turner, former Superintendent of the Renz Correctional Center and Attorney General William L. Webster of the State of Missouri, by Assistant Attorney General John W. Simon, and for their response to this Court's Order of September 25, 1991, directing them to show cause why the petitioner's request for a writ of habeas corpus should not be granted herein, state and allege all as follows:

Statement of Custody and Parties

Petitioner, Lynda Ruth Branch, is presently incarcerated at the Renz Correctional Center, in Jefferson City, Missouri, pursuant to the sentence and judgment of the Circuit Court of Boone County (the Hon. Sanford Francis Conley IV, Circuit Judge) entered on April 10, 1989, in its Cause No. 30DEC88-120833. Response Exhibit C at 97-98. A jury convicted the petitioner of murder in the first degree, and assessed and declared her punishment as life imprisonment without eligibility for probation orparole convicted. Id. at 91. The trial court sentenced the petitioner in accordance with the verdict. Id. at 97.

As head of the institution where this petitioner is incarcerated, Superintendent Bryan Goeke is the proper party respondent. 28 U.S.C. § 2254, Rule 2(a). Petitioner has named the former Superintendent, Mr. William R. Turner, as a respondent, but Mr. Turner has retired. Petitioner has also named Attorney General Webster as a respondent, but because the petitioner is attacking a sentence she is currently serving, there is no need to join the Attorney General as a party. Cf. 28 U.S.C. § 2254, Rule 2(b)(attorney general of sentencing jurisdiction proper party respondent when petitioner attacks future custody). Should further proceedings be necessary in the instant case, former Superintendent Turner should be dismissed as a party; Superintendent Goeke should be joined in his place; Attorney General Webster should be dismissed as a party and realigned as additional counsel of record for the proper respondent.

Statement of Exhibits

Pursuant to 28 U.S.C. § 2254, Rule 5, the respondents have submitted to the Court photocopies of the following exhibits, labeled with the letters set forth in this list:

A. Volume I of trial transcript in State v. Branch, No. 30DEC88-120833, Circuit Court of Boone County

B. Volume II of trial transcript in State v. Branch, No. 30DEC88-120833, Circuit Court of Boone County

C. Criminal appeal legal file in State v. Branch, No. WD-41852, Missouri Court of Appeals, Western District

D. Transcript of evidentiary hearing in Branch v. State, No. 89CC034522, Circuit Court of Boone County (petitioner's proceeding for state post-conviction relief)

E. Post-conviction relief legal file in Branch v. State, Missouri Court of Appeals, Western District, originally No. WD-43416, consolidated under State v. Branch, WD-41852, pursuant to Mo. S. Ct. R. 29.15(*l*)

F. Motion to dismiss appeal in State v. Branch, No. WD-41852, Missouri Court of Appeals, Western District

G. Suggestions in support of motion to dismiss in State v. Branch, No. WD-41852, Missouri Court of Appeals, Western District

H. Suggestions in opposition to the State's motion to dismiss appeal in State v. Branch, No. WD-41852, Missouri Court of Appeals, Western District

I. Petitioner's (there appellant's) brief in State v. Branch, No. WD-41852, Missouri Court of Appeals, Western District

J. State's (there respondent's) brief in State v. Branch, No. WD-41852, Missouri Court of Appeals, Western District

K. Opinion of the Missouri Court of Appeals, Western District, in State v. Branch, No. WD-41852, as reported at 811 S.W.2d 11 (April 30, 1991)

Statement Concerning Exhaustion

On the basis of the materials available to them at this time, it appears to counsel for the respondents that the petitioner has procedurally defaulted on the state remedies otherwise available to her to air the grievances set forth in her pending federal petition, and that for this reason, considerations of exhaustion need not delay the Court in disposing of the latter grievances. Coleman v. Thompson, 111 S.Ct. 2546, 2553-55 (1991); Daniels v. Jones, No. 90-2173-EM, slip op. at 2-3 (8th Cir. Sept. 11, 1991); Smith v. Jones, 923 F.2d 588, 589 (8th Cir. 1991).

Reasons for Denying the Writ

I.

For her *first* asserted ground for relief, the petitioner contends that the dismissal of her appeal by the Missouri Court of Appeals violated the due process and equal protection guaranties. Petition at 5-6.

Petitioner filed an appeal of the judgment and sentence against her. Response Exhibit C at 99-100. She filed both pro se and attorney-prepared motions for post-conviction relief pursuant to Mo. S. Ct. R. 29.15. Response Exhibit E at 4-25. When the motion court denied relief, Response Exhibit E at 26-36, she appealed that disposition, id. at 41-42. As provided by subdivision (*l*) of Rule 29.15, her direct appeal and the appeal of the motion court's denial of post-conviction relief were consolidated. Response Exhibits I-J.

After the petitioner's appeal had been filed, the State moved to dismiss her appeal on the basis of the escape rule. Response Exhibit F. In its motion and accompanying papers, the State demonstrated that the petitioner (who had been at large on bond throughout the trial and after the jury's verdict) had absconded before her sentencing. Petitioner fled the county in which she had been sentenced, and was apprehended in another county three (3) days after she failed to appear for sentencing. Ibid. The State adduced state and federal authority under which a criminal defendant who defies legal process by putting himself or herself beyond its control, and is recaptured, cannot seek relief by means of that same legal process. Response Exhibit G. Petitioner filed suggestions in opposition to the State's motion. Response Exhibit H.

Although the Missouri Court of Appeals took the State's motion with the case, and the parties proceeded to submit briefs, it dismissed the petitioner's consolidated appeal on the procedural basis advocated by the State. Response Exhibit K, 811 S.W.2d at 12. It cited State v. Wright, 763 S.W.2d 167, 168 (Mo. Ct. App. 1988), for the principle that "[t]he escape rule operates to deny the right of appeal to a defendant who, following conviction, attempts to escape justice." It reasoned that "[a] convicted defendant could not be allowed to remain out of the reach of justice, and to decide to return to the control of the court only after an acquittal by the appeal decision." 811 S.W.2d at 12, citing State v. Carter, 98 Mo. 431, 11 S.W. 979, 980 (1889).

In both Wright and Stradford v. State, 787 S.W.2d 832, 833 (Mo. Ct. App. 1990), the court pointed out, the Missouri courts had applied the escape rule to situations in which the would-be appellant had not physically broken out of jail, but had–like the petitioner–failed to appear for sentencing. Whereas Wright had applied the escape rule to a direct appeal, Stradford applied it to appeals of post-conviction relief proceedings. The court expressly declined to make a distinction between cases in which the appellant escaped before sentencing and those in which the appellant escaped after sentencing; it expressly declined to place the burden on the State to show prejudice resulting from the defendant's failure to appear for sentencing. It held that dismissal was justified "by a more fundamental principle: preservation of public respect for our system of law."

This judgment of the Missouri Court of Appeals is not only well-founded in logic and policy, but is also in accord with the practice of other jurisdictions, including the federal jurisdiction. In Molinaro v. New Jersey, 396 U.S.

498 (1970)(per curiam), a person had been convicted of a crime in the courts of a state, and was free on bail. He failed to surrender to the state authorities. On this basis, the Supreme Court of the United States declined to consider the merits of his appeal from the judgment of the state supreme court's affirmance of his conviction. In Estelle v. Dorrough, 420 U.S. 534, 537 (1975)(per curiam), the Supreme Court rejected any attempt to limit Molinaro to situations in which the criminal defendant was at large at the very time his or her appeal was pending, and upheld the Texas courts' dismissal of the appeal of a defendant who had escaped but had been recaptured. In United States v. Persico, 853 F.2d 134, 136-38 (2d Cir.), cert. denied, 486 U.S. 1022 (1988), the Second Circuit declined to review an appellant's allegations of trial error in a federal criminal trial, when he had absconded after conviction but before sentencing, and had been recaptured. See also United States v. DeValle, 894 F.2d 133, 135-37 (5th Cir. 1990)(declining to address merits of federal appellant's claims of trial error when appellant had absconded after conviction but before sentencing, and had subsequently been recaptured).

If the petitioner would have this Court reject the foregoing analysis, and reach the merits of this alleged ground for relief, holding that the Constitution, laws, or treaties of the United States require the result sought by the petitioner, any asserted claim to this effect is barred from litigation in federal habeas corpus unless the Court could say, as a threshold matter, that it would make its new rule of law retroactive. Teague v. Lane, 489 U.S. 288, 299-316 (1989)(plurality opinion). Accord, Penry v. Lynaugh, 109 S.Ct. 2934, 2944 (1989)(adoption of Teague analysis by majority of Court). Respondents are aware of no precedent from the Supreme Court holding that the United States

Constitution requires the states to provide appellate review of criminal convictions in cases in which the defendant has escaped.

Under the Teague analysis, a new rule of law announced in a federal habeas corpus case will be applied retroactively only if the new rule of law would make licit behavior that the pre-existing law had denounced as criminal, or because the new requirement was one "implicit in the concept of ordered liberty." Teague v. Lane, 489 U.S. at 307, 311-15, quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)(Cardozo, J.). Under Teague, moreover, a rule of law is "new" unless it is "dictated by precedent existing at the time the defendant's conviction became final." Id. at 301 (emphasis in the original). Prior decisions may "inform, or even control or govern," the disposition of an issue without thereby "compelling" or "dictating" the result for purposes of Teague analysis. Saffle v. Parks, 110 S.Ct. 1257, 1261 (1990)(emphasis supplied). Respondent suggests that none of the necessary conditions of applying a new rule of law is present in the instant case, and that for this reason among the others previously adduced, the petition should be denied.

II.

Petitioner's other asserted grounds for relief are barred by her procedural default in absconding after conviction and before sentencing in the state courts.

In addition to her direct challenge to the Missouri appellate court's application of the escape rule, the petitioner raises various claims of ineffective assistance of counsel and trial error. Petition at 6-11. This Court need

not concern itself with the nature of these claims, however, because all of them have been procedurally defaulted by the petitioner's failure to appear, as ordered, for her sentencing. As the Wright and Stradford cases illustrate, the escape rule is a well-settled part of the jurisprudence of the State of Missouri, supra pp. 5-6, and the Missouri Court of Appeals unequivocally invoked it to bar the petitioner's claims on appeal from her conviction per se and from the motion court's denial of state post-conviction relief.

In Wayne v. Wyrick, 646 F.2d 1268 (8th Cir. 1981), the Eighth Circuit recognized the Missouri escape rule as a legitimate procedural bar--in that case, upholding the decision of the United States District Court for the Eastern District of Missouri that a petitioner's counsel did not render him ineffective assistance in failing to perfect an appeal after the petitioner had absconded and thus triggered the escape rule. In Wayne v. Wyrick, the Eighth Circuit cited and quoted from decisions of the United States Supreme Court enforcing the escape rule, as well as from Missouri appellate decisions recognizing it. The court endorsed at least one of the the policies behind the rule by observing that "[b]y his escape" the petitioner in that case had "showed his disdain for the law and his unwillingness to abide by decisions adverse to him." 646 F.2d at 1270-71. In Buckley v. Lockhart, 892 F.2d 715, 720 (8th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990), the Eighth Circuit applied Wayne even more recently--holding that in light of the petitioner's escape, he had shown no cause and suffered no prejudice under Wainwright v. Sykes from the fact that an Arkansas appellate court did not consider his appeal on the merits. See also Prihoda v. McCaughtry, 910 F.2d 1379, 1387 (7th Cir. 1987)(Easterbrook, J.). The escape rule applies to cases--like the instant case--in which a person convicted in state court fails to appear as ordered

in the state court system, then files a federal habeas corpus petition. E.g., Gonzales v. Stover, 575 F.2d 827 (10th Cir. 1976)(per curiam).

Wayne, Buckley, Prihoda, Gonzales, and the cases they cite stand for a general policy. That policy denies prisoners the remedial offices of the federal courts to mount collateral attacks on their convictions when, as here, a prisoner has–by his or her actions–expressed his or her unwillingness to abide by the decisions of the legal system while it processes his or her case. This policy is but one instance in which the equitable nature of habeas corpus shows itself. Last Term the Supreme Court issued an opinion which twice reminded the reader that the equitable principle of "clean hands" applies to habeas corpus, in that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." McCleskey v. Zant, 111 S.Ct. 1454, 1465, 1468 (1991), quoting Sanders v. United States, 373 U.S. 1, 17 (1963). This age-old principle, enforced recently by the highest court in the land, supports the enforcement of the escape rule as a procedural bar.

Petitioner can therefore receive consideration of this grievance in federal habeas corpus only on a showing of "cause" for the procedural default and "actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 443 U.S. 72, 87 (1977)(emphasis supplied). For the purpose of this analysis, "cause" must ordinarily be "some external impediment preventing counsel from constructing or raising the claim." Murray v. Carrier, 477 U.S. 478, 492 (1986). Respondents submit that there can be no "cause" adequate to justify the procedural default in this case. Petitioner's attempt to explain her failure to appear for sentencing reinforces the respondents' position

that she was willfully defying the judgment of her peers, and because she disagreed with the jury's verdict, she refused to submit to it:

> . . . I will apologize for not appearing on the 3rd [of April, 1989, for sentencing]. My actions were just due to my confusion and my extreme emotional duress. The sentence the jury recommended was just beyond my comprehension. I still contend that I am not guilty, that I did not deliberately kill my husband, that I acted in self-defense of myself and my child. And I feel that if this Court imposes this sentence on me that it tells all the men that they have the right to assault their wives, beat them, abuse them physically and emotionally and then if the women fight back in any form whatsoever that they're, you know, that they're going to be severely punished even if they try to defend themselves. And I think this is an injustice to everybody, to every woman that's ever been through what I have.
>
> Now, I will take my responsibility for my actions and say that, you know, nobody is any sorrier that he's dead than I am, but I didn't mean to kill him. And I don't think that life without parole is fair to me to my family or any other battered woman.

Response Exhibit B at 857-58. If a petitioner's asserted belief that he or she was not guilty of the charge of which he or she had been convicted–or not deserving of the sentence the jury recommended–were "cause" for the

procedural default of absconding before sentencing, then the escape rule would be abrogated. Respondents urge this Court to apply this procedural default to deny the petitioner relief in the federal forum, as the Missouri Court of Appeals applied it to deny her relief in the state forum.

If this Court were not to consider the procedural bar that the Missouri Court of Appeals enforced to be sufficient to preclude its considération of the petitioner's asserted grounds for relief, the respondents would respectfully request a reasonable opportunity further to plead to the pending petition.

Conclusion

WHEREFORE, the respondents pray the Court for its order that the pending petition be dismissed without further judicial proceedings.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

s/John W. Simon
JOHN W. SIMON
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri
65102

(314) 751-0561

Attorneys for Respondents

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was deposited in the mails, first-class postage prepaid, this ____ day of October 25, 1991, to

Cyril M. Hendricks, Esq.
Hendricks & Smith
Hawthorn Center, First Floor
301 East McCarty Street
Jefferson City, Missouri 65101

s/John W. Simon
Assistant Attorney General

Question Presented, Argument, and Conclusion of Appellant's Brief in Branch v. Goeke, No. 92-3935-WMJC (8th Cir. May 7, 1993), pages iv & 3-14

THE DISTRICT COURT ERRED IN DENYING THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE MISSOURI COURT OF APPEALS VIOLATED HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN IT SUMMARILY DISMISSED HER CONSOLIDATED APPEALS BASED ON THE "ESCAPE RULE", IN THAT THE BLANKET APPLICATION OF THE "ESCAPE RULE" WAS ARBITRARY AND IRRATIONAL BECAUSE THE COURT FAILED TO CONSIDER THAT THE PETITIONER HAD NOT YET INITIATED THE APPELLATE PROCESS AT THE TIME OF HER ALLEGED ESCAPE, NOR DID HER ACTIONS BURDEN OR DELAY THE NORMAL APPELLATE PROCESS.

ARGUMENT

It is not disputed that Missouri courts recognize the escape rule. The escape rule operates to deny the right of appeal to a criminal defendant who escapes or attempts to escape following conviction. State v. Branch, 811 S.W.2d 11, 12 (Mo. Ct. App. 1991) (citing State v. Wright, 763 S.W.2d 167, 168 (Mo. Ct. App. 1988)). Federal Courts recognize the escape rule, as well. See Ortega-Rodriguez v. United States, 61 U.S.L.W. 4225, 4227-28, No. 91-7749 (March 8, 1993) (discusses several federal cases on the escape rule).

The escape rule has been used to preclude appeal by defendants who escaped either prior to invoking the appellate process or after its initiation. Various rationales for the rule have been posited by these courts. Where it is applied to those who escape after invoking the appellate process, courts have cited concerns as to the enforceability of the Court of Appeals' judgment in situations where the defendant has not yet been apprehended. Ortega-Rodriguez, 61 U.S.L.W. at 4227 (citing Smith v. United States, 94 U.S. 97 (1876)); Branch, 811 S.W.2d at 12 (citing State v. Carter, 11 S.W. 979, 980 (Mo. 1889)). In both the preceding situation, and in the case where the defendant escapes after initiating the appellate process, but has been apprehended, dismissal has been justified on the basis of administrative problems, docket control, the disruption of the appellate process, and prejudice to the State caused by prolonged absence. Estelle v. Dorrough, 420 U.S. 534, 541-42, 95 S.Ct. 1173, 1178 (1975); Branch, 811 S.W.2d at 12, State v. Kearns, 743 S.W.2d 553, 554-55 (Mo. Ct. App. 1987); The foregoing concerns have been used to justify dismissal where a defendant escapes prior to invoking the appellate process. See U.S. v. Holmes, 680 F.2d 1372, 1374 (11th Cir. 1982), cert. denied, 460 U.S. 1015, 103 S.Ct. 1259 (1983); Branch, 811 S.W.2d at 12; Kearns, 743 S.W.2d at 554.

Other rationales have been advanced to support dismissal regardless of whether the defendant escapes prior to or after initiating the appellate process. Courts advocate the use of the escape rule to deter escape. See Ortega-Rodriguez, 61 U.S.L.W. at 4228; Kearns 743 S.W.2d at 555 (citing United States v. Puzzanghera, 820 F.2d 25, 27 (1st Cir. 1987)); State v. Wright, 763 S.W.2d 167, 168 (Mo. Ct. App. 1988) (citation omitted).

An additional explanation for the escape rule that is applied in both situations is the disentitlement theory. When the disentitlement theory is applied to defeat the right to appeal of a defendant who escaped during the appellate process, it operates as a waiver of defendant's appeal. See Ortega-Rodriguez, 61 U.S.L.W. at 4227; Kearns, 743 S.W.2d at 554-55 (citing Puzzanahera, 820 F.2d at 26). Waiver involves the intentional relinquishment of a known right. Heintz v. Swimmer, 811 S.W.2d 396, 399 (Mo. Ct. App. 1991); C.F. Waterwiese v. KBA Constr. Managers, Inc., 820 S.W.2d 579, 585 (Mo. Ct. App. 1991) (For implied waiver, one's "actions must be so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation . . . is possible." Id.).

A waiver in this situation is implied because defendant's invocation of the appellate process is a voluntary exercise and it suggests defendant's knowledge and awareness of appellate procedures available. Escape in light of the instigation of the appellate process could be construed as a waiver of rights thereunder. However, without the defendant's affirmative action to initiating review, the concept of waiver is inapplicable. One cannot assume away a defendant's rights by presuming the state of her knowledge and awareness and by presuming a reason for her actions unless some statement or action on her part clearly imparts that message.

Disentitlement theory also has been used to dismiss an appeal where the defendant escaped prior to seeking appellate review. See Holmes, 680 F.2d at 1374; Branch, 811 S.W.2d at 12, Stradford v. State, 787 S.W.2d 832, 833, 834 (Mo. Ct. App. 1990); Kearns, 743 S.W.2d at 555,

(discussing Holmes, 680 F.2d 1372) (citing Molinaro v. New Jersey, 396 U.S. 365, 366, 90 S.Ct. 498, 499 (1970).

Petitioner argued to the Missouri Court of Appeals, Western District, that the escape rule should not be applied in her case since her absence from custody lasted for only three days. Branch, 811 S.W.2d at 12. In its dismissal of her appeals, the Court of Appeals stated, "It is the escape and not the lapse of days the escape measures that operates to disentitle the right of appeal. . . ." Id.[1]

The Court of Appeals based the application of the escape rule upon the fact of escape. This calls for, in effect, a blanket and automatic application of the escape rule regardless of the attendant circumstances. Further, even absent the quoted statement, the dismissal of Petitioner's appeals, where she had not yet initiated appellate review and where she was returned to custody and sentenced, and she filed her Notice of Appeal seven days after her conviction, is tantamount to a blanket, automatic application of the escape rule. Disentitlement theory based only upon the fact of escape suggests that the mere fact of affronting the dignity of any component of the court system, and not the Court of Appeals in particular, however slight, requires the drastic sanction of denial of appellate review. See Ortega-Rodriguez, 61 U.S.L.W. at 4229.

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[1]Petitioner notes that the Court of Appeals cited Molinaro v. New Jersey, 396 U.S. 365, 90 S.Ct. 498 (1970) as support for its decision. Branch, 811 S.W.2d at 12. The holding of the Molinaro Court, however, applied to a defendant "who has sought review" and later escapes. Molinaro, at 366, 498.

The approach taken by the Branch court clearly and directly conflicts with the principles announced in the recent opinion of the United States Supreme Court in Ortega-Rodriguez v. United States, 61 U.S.L.W. 4225 (1993). There, the Court, while conceding the validity of the escape rule, recognized that it involves a fact-specific inquiry and requires discretionary application. Id. at 4230.

In Ortega-Rodriguez, the petitioner there was convicted, but did not later appear for sentencing. Id. at 4226. Eleven months later he was apprehended. Id. The petitioner filed a timely Notice of Appeal from the final judgment. Id. at 4227. The Court of Appeals dismissed his appeal based on the escape rule. Id. The Supreme Court vacated the judgment of the Court of Appeals and remanded the cause. Id. at 4230.

The Court cited the rationales previously discussed herein as support for the escape rule. Id. at 4227-28. It went on to observe, "[T]he justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. These justifications are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the district court, so that a defendant's fugitive status at no time coincides with his appeal." Id. at 4228.

The Court dismissed certain of the rationales as largely irrelevant to the situation where the defendant escapes but returns to custody before timely invoking the appellate process. First, as to enforceability in such a case, the defendant has been returned to custody and is within the

control of the appellate court throughout that process. Id. Second, as to the concern for the efficient operation of the appellate process and administrative difficulties that arise due to escape, the Court that is inconvenienced in this situation is the district court, rather than the appellate court. Id. at 4229. Third, regarding the need to deter escape, the Court pointed out that the district courts have more appropriate remedies for this purpose. Id.

Fourth, regarding disentitlement theory and concern for the affront to the dignity of the court, the Supreme Court noted that it is the authority and dignity of the district court, not the appellate court, that is flouted. Id. "We cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings." Id. (emphasis added). Thus, the Court determined that the disentitlement theory by itself, where the defendant escapes and is returned prior to initiating an appeal, does not justify the dismissal of an appeal. Id. The reasoning that the Supreme Court rejected is the very reasoning relied upon by the Court of Appeals in dismissing Petitioner's appeal. See Branch, 811 S.W.2d at 12.

Each of the rationales offered by courts using the escape rule, with the exception of disentitlement theory as applied where a defendant escapes and returns before seeking appellate review, is premised upon defendant's escape impacting on the appellate tribunal. The Supreme Court in Ortega-Rodriguez has held that these rationales generally do not sufficiently impact on the appellate process such that dismissal of an appeal would be merited. Moreover, the Court determined that the disentitlement

theory, without more, as applied to a situation similar to that of Petitioner herein, cannot support dismissal of a defendant's appeal.

The most significant aspect of the Court's decision is that the Court recognizes that the impact of escape is a matter of degree, dependent upon factual context. Thus, the Court pointed out that there may be cases where the defendant's actions while his case is before the district court "might have an impact on the appellate process sufficient to warrant an appellate sanction." Id. at 4230. For example, where disruption of the appellate process is the cited reason for dismissal, it may be appropriate where a defendant's flight constituted a "significant interference with the operation of the appellate process." Id. The paramount determination to be made in these cases is that a defendant's escape have "the kind of connection to the appellate process that would justify an appellate sanction of dismissal." See Id.

We initially acknowledge that the Constitution provides no right to appeal. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834 (1985) (citing McKane v. Durston, 153 U.S. 684, 14 S.Ct. 913 (1894)); Order Denying Petition for Writ of Habeas Corpus, Addendum 7. "Nonetheless, if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Evitts, 469 U.S. at 393, 105 S.Ct. at 834 (citing, in part, Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590 (1956); C.f. State v. Crabtree, 625 S.W.2d 670, 673 (Mo. Ct. App. 1981); State v. Greathouse, 519 S.W.2d 299, 301 (Mo. Ct. App. 1975). As the District Court

pointed out, Missouri provides for direct appeal as of right upon conviction upon any indictment or information. See 547.070 RSMo. 1986; Order Denying Petition for Writ of Habeas Corpus, Addendum 7.

In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976), the Supreme Court set out the appropriate procedural due process analysis. It determined that three factors must be weighed:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Id. at 335, 903; Order Denying Petition for Writ of Habeas Corpus, Addendum 8.

The District Court observed that the first two factors weighed in petitioner's favor. (Addendum 8-9) However, as to the third factor, the court wrote, "Missouri has a substantial interest in encouraging obedience to procedural rules and court orders. Here, the record shows that petitioner's absence was not due to events beyond her control, but merely to her confusion and unwillingness to accept the verdict. Therefore, petitioner's right to due process was not violated . . . ." Order Denying Petition for Writ of Habeas Corpus, Addendum 9.

In light of the Ortega-Rodriguez case, Petitioner argues the District Court erroneously held that Petitioner's due process rights were not violated. We do not dispute that the courts have an interest in parties' compliance with procedural requirements. However, here, none of the Court of Appeals' rules were violated. Petitioner had not yet invoked the appellate process. Further, although Petitioner failed to appear for sentencing on April 3, 1989, she soon was returned to custody on April 6, 1989. Branch, 811 S.W.2d at 11. She delayed the sentencing by less than three days. In addition, Petitioner filed her Notice of Appeal only seven days after her conviction. She filed her Notice of Appeal within the same time frame as she would if she had been sentenced on the original date set, i.e. April 3, 1989. The appellate process was not delayed or interfered with in any way. Thus there was no rational reason for the Court of Appeals to treat Petitioner's appeal any differently than if she had appeared on the original sentencing date as ordered by the trial court. Moreover, should the Court of Appeals have heard her appeal and reversed the conviction, the State would not be prejudiced in its prosecution since the appellate process was not delayed or hampered. The significant interference standard of Ortega-Rodriguez clearly is not met where there is no interference at all.

There simply is no significant relationship between Petitioner's escape and the appellate court. Yet the Court of Appeals denied her the right to have her conviction reviewed for error. To deny the right of appeal with no rational basis for such denial operated to deny petitioner her right to due process as guaranteed by the Constitution of the United States.

The decision of the District Court does not comport with the constitutional standards for due process of law under Mathews. Nor does the decision comport with the principles announced in Ortega-Rodriguez. Although these standards and principles are significant to every case, it is especially important that they be complied with in a case such as Petitioner's, where the defendant deprived of her right to appeal has been sentenced to life imprisonment without possibility of parole for fifty years. Petitioner asks that a Writ of Habeas Corpus be issued directing the Court of Appeals for the Western District of Missouri to hear Petitioner's appeal.

CONCLUSION

Petitioner's right to due process, guaranteed her by the Constitution of the United States, clearly was violated by the Court of Appeal's dismissal of Petitioner's consolidated appeals. The circumstances of Petitioner's case require that a Writ of Habeas Corpus be granted. Petitioner's failure to appear was corrected within three days. She had no involvement with the Court of Appeals prior to her return to custody. Her Notice of Appeal was filed within the same period of time as if she were sentenced on the date originally set. Petitioner's actions in no way affected the Court of Appeals.

The right to appeal a criminal conviction provides a most significant level of protection against unjustified convictions. Petitioner faces life imprisonment without parole for fifty years. An appeal of her conviction may bear ramifications of grand proportion for her entire life.

An instructive and similar situation is found in the treatment of escape before trial. In that situation, a

defendant is not denied her right to a fair trial. Rather, a capias warrant is issued and a trial is had following the defendant's return to custody. Although the right to an appeal is not constitutionally derived, it has been provided as of right to criminal defendants and has come to occupy an exceptionally important position in the scheme of due process analysis.

Petitioner respectfully requests that the District Court's Order Denying Petition For Writ of Habeas Corpus be reversed, and that a Writ of Habeas Corpus be issued, directing the Missouri Court of Appeals for the Western District to reinstate and hear Petitioner's consolidated appeals.

Argument and Conclusion from Appellee's Brief in *Branch v. Goeke*, No. 92-3935-WMJC (8th Cir. June 18, 1993), pages 6-19

Argument

The district court did not err in rejecting the petitioner's contention that the dismissal of her appeal by the Missouri Court of Appeals violated the due process clause of the fourteenth amendment, because the Missouri "escape" or "fugitive dismissal" rule--on its face and as applied to the petitioner--has a rational basis in criminal jurisprudence, in that it deters escapes, failures to appear, and other fugitive acts or omissions, and promotes the dignity, efficacy, and credibility of the legal system as a whole.

For her sole point on appeal, the petitioner urges that the district court erred in denying relief because the state appellate court's dismissal of her appeal "violated her constitutional right to due process of law," in that its application of the rule to the petitioner was "arbitrary and irrational" in that (she continues) it "failed" to consider that at the time of her "alleged escape" she had not initiated the appellate process and that her actions did not "burden or delay the normal appellate process." Brief at iv. Respondent answers that the state courts' enforcement of their own "escape" or "fugitive dismissal" rules does not violate the due process rights of a criminal defendant before them who fails to appear for sentencing, at least where, as here, the defendant offers no excuse except purported shock and confusion concerning the jury's verdict.

In making this argument, the petitioner relies most prominently on the recent decision of the United States Supreme Court in Ortega-Rodriguez v. United States, 113 S.Ct. 1199 (1993). In Ortega-Rodriguez, the Supreme Court held, by a vote of five to four, that the "escape" or "fugitive dismissal" rule internal to the federal judiciary should not be employed automatically to dismiss the federal-court appeals of federal criminal defendants who escape, fail to appear, or are otherwise fugitives *before* sentencing and *before* they have invoked the appellate process, but that the federal appellate courts must first consider whether a given case or a given class of cases involves "the kind of connection between fugitivity and the appellate process" that justifies dismissal of any appeal by a federal criminal defendant who escapes, fails to appear, or is otherwise a fugitive when his or her appeal is pending. Id. at 1208-10. In so holding, the majority disapproved the doctrine of the Eleventh Circuit in United States v. Holmes, 680 F.2d 1372, 1373 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), mandating such dismissals of federal-court appeals on the basis of *former* fugitive status. The four dissenting Justices agreed with the majority that "there must be some 'connection' between escape and the appellate process" to support the sanction of dismissal, but "disagree[d] with the conclusion that recapture before appeal generally breaks the connection." Id. at 1210-13 (Rehnquist, C.J., dissenting).

Neither this Court nor a majority of the Circuits followed the rule of United States v. Holmes that the Supreme Court majority disapproved in Ortega-Rodriguez. See Perko v. Bowers, 945 F.2d 1038, 1040 (8th Cir. 1991)(noting United States v. Holmes as more extensive than applications of "escape" rule approved by Supreme Court). Consequently, Ortega-Rodriguez is of practical

importance principally in the Eleventh Circuit and in the Circuits that had previously followed the rule of United States v. Holmes. E.g., United States v. DeValle, 894 F.2d 133, 136 (5th Cir. 1990)(citing United States v. Holmes approvingly for general proposition); United States v. Parrish, 867 F.2d 1107, 1108 (D.C. Cir. 1989)(per curiam)(citing United States v. Holmes as authoritative but also making particularized findings).

Moreover, the Supreme Court decided Ortega-Rodriguez as a matter of its supervisory jurisdiction over the other federal courts, rather than as a matter of constitutional adjudication in a case arising in the federal courts or in the courts of a state. As the Supreme Court explained in Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974), there is a radical difference between "the broad exercise of supervisory power" that a federal appellate court possesses "in regard to [its] own trial court[s]" and "the narrow [review] of due process . . . ." This distinction would apply even if the instant case involved a direct appeal of a federal-court criminal conviction. E.g., United States v. Hale, 422 U.S. 171, 180 n.7 (1975)(applying distinction). See also Griffin v. United States, 112 S.Ct. 466, 470, 472 (1991)(drawing distinction).

Neither this Court nor the Supreme Court of the United States possesses "supervisory jurisdiction" over the appellate court systems of the several states. In particular, in order to invoke this Court's jurisdiction to grant relief under 28 U.S.C. § 2254, a state prisoner–such as this petitioner–must show that he or she is custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). See Estelle v. McGuire, 112 S.Ct. 475, 480 (1991)("we reemphasize that it is not the province of a federal habeas court to reexamine state court

determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); Lewis v. Jeffers, 110 S.Ct. 3092, 3102 (1990).

Showing that a state court's rule or practice would be rejected if proposed for adoption as a federal rule or practice would obviously fall far short of showing a violation of the guaranty of due process enforceable against the states via the fourteenth amendment. See Darden v. Wainwright, 477 U.S. 168, 180 (1986)(citing Donnelly v. DeChristoforo on distinction between "broad exercise of supervisory power" and "narrow [review] of due process"). Yet that is the *most* the petitioner can do with Ortega-Rodriguez. Indeed, the fact that four Justices out of nine approved the Eleventh Circuit's rule, and would, in effect, have made it applicable to all the federal appellate courts, is powerful evidence that the Missouri "escape" or "fugitive dismissal" rule does not violate the due process clause.

In any event, even if this case had arisen in federal court, and this Court had dismissed the petitioner's direct appeal or her section 2255 action on account of her failure to appear for sentencing, it would not follow that its dismissal would be reversed in light of Ortega-Rodriguez. That decision disapproved an *automatic* dismissal rule in respect to appellants who had escaped, failed to appear, or otherwise became fugitives prior to sentencing, but who had been recaptured before appeal; it did not mandate an automatic *non*-dismissal rule as to such appellants.

In the instant case, the appellate court had several important facts about the case before it, including, for example, the gravity of the offense, the passage of time

since the offense, the absence of objective excuse, and the unavailability of a credible deterrent (in light of the fact that the petitioner was already under a sentence of life without eligibility for probation or parole).[2] Even if Ortega-Rodriguez applied to the instant case with full force (which it does not), a court having "broad supervisory power" over the court that dismissed the petitioner's appeal

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[2]In Ortega-Rodriguez v. United States, 113 S.Ct. 1199, 1202 (1993), the majority discusses the fact that the trial court found the prisoner guilty of contempt of court and failure to appear, and for these separate offenses sentenced him to imprisonment for twenty-one (21) months to be served consecutively to his underlying sentence for drug offenses. It also allows that the federal appellate courts need not make case-by-case adjudications before applying the "escape" or "fugitive dismissal" rule in each instance, but may identify classes of appellants to whom the rule shall apply once it is demonstrated that they fall within a given class. Id. at 1209 n.23. In the instant case, the petitioner knew that she would be sentenced to life imprisonment without eligibility for probation or parole; the prosecution had waived the death penalty, and Missouri law allowed no other punishment for murder in the first degree. Petitioner could not credibly have been deterred from absconding by any sentence of imprisonment. In a court system whose "escape" or "fugitive dismissal" rule was applied somewhat more narrowly than the Missouri rule is applied, appellants facing a sentence of life imprisonment would constitute an apt class of appellants to whom to apply this sanction, because no prison sentence would credibly deter persons in their situation from escaping, absconding, or otherwise becoming fugitives.

could either affirm the judgment or remand for reconsideration on the existing record.[3]

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[3]After the petitioner filed her brief, the Missouri Supreme Court issued an opinion in Robinson v. State, 1993 WL 173098, No. 75244 (Mo. May 26, 1993)(en banc), suggesting, in dictum in a footnote, that the federal-court decision in Ortega-Rodriguez may provide a basis for its reconsideration, in future cases, of the breadth of applicability of its own "escape" or "fugitive dismissal" rule as a matter of Missouri common law. Id. at *3 n.2. In Robinson, the prisoner had sought to challenge alleged acts or omissions occurring *after* he had been returned to custody; the Missouri Supreme Court pointed out that *even* in United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983)--which it characterized as "the 'high-water mark' of the federal escape rule"--the Eleventh Circuit had taken pains to acknowledge that "a defendant who flees after conviction but before sentencing 'does not waive his right to appeal from any alleged errors connected to his sentencing.'" Id. at *2, quoting 680 F.2d at 1373. Because there was no room for discretion left with the trial court concerning sentencing in the instant appeal, the petitioner can find no comfort in the holding in Robinson. See Robinson v. State, id. at *3 n.3 (citing State v. Branch, supra). In any event, Robinson makes clear its correct understanding that "Ortega-Rodriguez merely decided the issue [of the United States v. Holmes rule] with respect to federal law and not on a Constitutional basis; the decision does not bind us." Id. at *3 n.2. The mere fact that a state court may consider Ortega-Rodriguez to be persuasive authority on a common-law doctrine does not make Ortega-Rodriguez mandatory authority as a matter of federal law, enforceable on collateral attack in federal court.

Petitioner argues that the traditional rationales for the "escape" or "fugitive dismissal" rule do not support the application of it to her case. She argues, persuasively, that her absence did not render the appellate court's judgment unenforceable, nor did it significantly delay the processing of her appeal. Brief at 3-4, citing, inter alia, Estelle v. Dorrough, 420 U.S. 534, 541-42 (1975); State v. Carter, 98 Mo. 431, 11 S.W. 979, 980 (1889). She notes, however, that other rationales employed to support such rules include the deterrence of escape and principle that a person who seeks to defeat the legal system by absconding rather than abiding by its judgment has waived the right to call on that system for relief on appeal or collateral attack, and is disentitled to pursue appeals or collateral-attack proceedings which it makes available to those who are willing to abide its judgment. Brief at 4-5, citing, inter alia, Molinaro v. New Jersey, 396 U.S. 365, 366 (1970)(per curiam); Stradford v. State, 787 S.W.2d 832, 833, 834 (Mo. Ct. App. 1990); State v. Wright, 763 S.W.2d 167, 168 (Mo. Ct. App. 1988).

Respondent does not rest the Missouri courts' enforcement of the "escape" or "fugitive dismissal" rule solely on narrowly pragmatic concerns such as the enforceability of judgments or the delay of appellate proceedings. As the Missouri Court of Appeals explained the Missouri doctrine:

> The escape rule preserves respect for the system of justice under which [the appellant] was convicted and to which she now comes for relief from her conviction. [United States v. Puzzanghera, 820 F.2d 25,] 26 [(1st Cir. 1987).] That system favors law over expediency. Under it the law applies

> equally to those who enforce the criminal law and those who become the targets of that enforcement. . . .
>
> Those who seek the protection of this legal system must, however, be willing to abide by its rules and decisions. [Appellant] comes before this court seeking vindication of her Fourth Amendment rights. Earlier, however, when she absconded she showed her reluctance to accept the vindication of her rights by this court. She may not selectively abide by the decisions of the courts. Wayne v. Wyrick, 646 F.2d 1268, 1271 (8th Cir. 1981). By absconding, she has forfeited her right to appeal.

State v. Wright, 763 S.W.2d at 168-69.

Another court system may make the policy decision not to enforce the foregoing principle linking the opportunity to take an appeal with the responsibility to render oneself amenable to the legal system. In a highly qualified sense, one may say that the federal court system made a different policy decision in Ortega-Rodriguez. It does not follow, however, that a court system such as Missouri's is "arbitrary and irrational" for viewing the legal system as a seamless web, and attaching the sanction of appellate dismissal to the act of absconding before filing an appeal.

Petitioner acknowledges, as she must, that there is no federal constitutional right to an appeal. Brief at 9, citing Evitts v. Lucey, 469 U.S. 387, 393 (1985). See also Jones v. Barnes, 463 U.S. 745, 751 (1983). She points out,

equally correctly, that when a state chooses to make appeals available "as an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant[,]" it must conduct these appeals consistently with the due process and equal protection clauses of the United States Constitution. Brief at 9-10, citing, inter alia, Evitts v. Lucey, 469 U.S. at 393, quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956). Thus, when a state makes appellate review "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant[,]" it may not deny appellate counsel to appellants too poor to afford to hire one on their own. Douglas v. California, 372 U.S. 353 (1963).

Citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the petitioner argues that in order to satisfy the minimal requirements of due process, a state's "escape" or "fugitive dismissal" rule must require the same operational linkage between fugitive status and the appellate process that the Supreme Court required, *as a matter of its supervisory power*, in the definition of the federal "escape" or "fugitive dismissal" rule in Ortega-Rodriguez. Brief at 10-12. Such an analysis would open up every state-law procedural rule to second-guessing in another forum whenever there was room for honest differences of opinion about the utility of a given procedure or the wisdom of enforcing a given principle. Forcing every state's appellate process into a single mold would stifle the growth of the law, and would deny to all jurisdictions the benefit of the experience of one jurisdiction that chooses to depart in the slightest from any given "majority rule."

As the Supreme Court explained in Beck v. Washington, 369 U.S. 541 (1962), concerning the

consequences of providing a federal forum to litigate claims that state court decisions violate the equal protection clause:

> [The equal protection clause of] the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error . . . ." [O]therwise, every alleged misapplication of state law would constitute a federal constitutional question.

Id. at 554-55, quoting Milwaukee Elec. Ry. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106 (1920). This principle of comity and federalism applies with full force to federal habeas corpus proceedings. E.g., Alford v. Rolfs, 867 F.2d 1216, 1219 (9th Cir. 1989). If every rule with which one disagreed strongly enough violated the due process clause of the fourteenth amendment, then the entire length and breadth of state court proceedings would be but an extended "tryout on the road" for "the main event" in the federal courts. See Wainwright v. Sykes, 433 U.S. at 90. That is not the law. E.g., Herrara v. Collins, 113 S.Ct. 853, 861-70 (1993); Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 1718-21 (1992); Coleman v. Thompson, 111 S.Ct. 2546, 2553-55, 2563-65 (1991).

Of course, at least since 1889, the right to an appeal from a criminal judgment in Missouri has been *subject to* the common-law "escape" rule. State v. Carter, supra. Petitioner argues that as applied to a person, such as herself, who absconded before sentencing and the filing of an appeal, the Missouri "escape" or "fugitive dismissal" rule has "no rational basis." Brief at 11. For this Court to accept the petitioner's premise, it would have to deny to the Missouri courts the policy option of linking the opportunity

to take an appeal with the responsibility to abide by the decisions of the legal system of which appellate courts are a part. One can *disagree* with that policy option without denying that it has a "rational basis."

In its dispositive opinion, the district court rejected the contention that the Missouri "escape" or "fugitive dismissal" rule had no "rational basis" in the course of denying the petitioner's equal protection claim, which is not advanced in this appeal:

> The various rationales stated by Missouri courts in support of the escape rule are all legitimate state interests and the escape rule rationally furthers these interests.

Addendum at 10-11.

Evaluating the petitioner's due process argument according to the model of Mathews v. Eldridge that the *petitioner* advances, the district court made the following findings of fact: "Here, the record shows that petitioner's absence [from the trial court on the date set for sentencing] was not due to events beyond her control, but merely to her confusion and unwillingness to accept the verdict." Addendum at 9. Respondent does not understand the petitioner to dispute these findings. Brief at 2.[4]

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[4]Although, for the reasons and on the authorities set forth in the text, the respondent is under no obligation to defend the district court's findings of fact, it is hardly credible that the petitioner found the jury's verdict "beyond comprehension" when she had previously been convicted by a jury of the very same offense. State v. Branch, 787 S.W.2d 595 (Mo. Ct. App. 1988).

In any event, district-court factfindings are subject to appellate review only under the clearly erroneous standard set forth in Fed. R. Civ. P. 52(a). E.g., Couch v. Trickey, 892 F.2d 1338, 1341 (8th Cir. 1989). At least in light of the 1985 amendment to Rule 52, the clearly erroneous standard applies not only to factual findings made on the basis of viva-voce testimony, but extends, as well, to factual findings made on the basis of documentary evidence. This standard applies not only to facts directly proved, but also to inferences from documents or from undisputed facts. United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948); Birdwell v. Hazelwood School Dist., 491 F.2d 490, 494 (8th Cir. 1974). Thus, findings that the district court made on the basis of the record developed in the state courts are reviewed under the clearly erroneous standard. Petitioner could not show that the district court's fact-findings were clearly erroneous even if she had tried.

Having failed to present contrary evidence in the state courts, moreover, the petitioner would have been precluded from presenting "new" evidence in federal court, at least in the absence of a showing of "cause" and "actual prejudice" as defined in Wainwright v. Sykes and its progeny. Keeney v. Tamayo-Reyes, 112 S.Ct. at 1717-21; Blair v. Armontrout, 976 F.2d 1130, 1141-42 (8th Cir. 1992)("Blair II"); Bolder v. Armontrout, 921 F.2d 1359, 1363 (8th Cir. 1990), cert. denied, 112 S.Ct. 154 (1991)("Bolder I"); Byrd v. Armontrout, 880 F.2d 1, 7 (8th Cir. 1989), cert. denied, 110 S.Ct. 1328 (1990)("Byrd I"). There is no question that she was afforded an opportunity to present to the trial judge any excuse she could think of; she exercised this opportunity. Response Exhibit B at 857. Petitioner could have come to court for her sentencing, but did not. She manifested no intention to return for

sentencing: the fact that she was caught only three (3) days later should not be counted to her credit.

Petitioner has failed to establish that Ortega-Rodriguez has any bearing on this federal action; although the Missouri appellate courts may view it as persuasive authority in the continuing development of their common-law "escape" or "fugitive dismissal" rule, Ortega-Rodriguez does not set forth a constitutional rule for either the federal courts or their state counterparts.[5] Petitioner has failed to establish that the Missouri "escape" or "fugitive dismissal" rule--on its face or as applied in her case--lacks a "rational basis." To the contrary, it deters escapes, failures to appear, and other fugitive acts or omissions. In some cases--such as this petitioner's--it is the only remaining credible deterrent to misconduct subversive of the legal system. Such a rule makes clear to all concerned that with the opportunity to pursue remedies offered by the legal system comes the responsibility to adhere to its judgments.

Respondent does not argue that the federal courts should adopt an "escape" or "fugitive dismissal" rule with the same contours as the rule developed by the Missouri courts. He argues only that the Missouri courts have acted within the Constitution, laws, and treaties of the United States in fashioning their own. In a scholarly and dispassionate opinion--rendered after months of deliberation--the district court agreed. Its judgment should be affirmed.

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[5]If this Court were to disagree, and believe that Ortega-Rodriguez was a constitutional rule, such a conclusion could not be enforced in this collateral-attack proceeding consistently with the principles set forth in Teague v. Lane, 489 U.S. 288, 299-316 (1989)(plurality opinion), and its progeny. See Doc. No. 3 at 7-8.

Conclusion

WHEREFORE, the respondent prays the Court that the judgment of the district court be affirmed.

Transcript of Oral Argument in *Branch v. Goeke*, No. 92-3935-WMJC (8th Cir. Sept. 15, 1993)

MR. HENDRICKS: May it please the Court. Your Honor, my name is Cyril Hendricks, and I represent the Appellant, Lynda Branch. With me today is Katherine Benson who helped me with the writing of this brief. She will not participate in the argument.

This may be a rare treat for this court because we're presenting to you a very simple and a very narrow issue for your decision.

This case involved an appellate sanction which has been used in both the appellate courts -- or in both the state courts and in the federal courts for many years, and basically that's a remedy where if someone escapes from custody, whether it be before sentencing, whether it be after sentencing, that they forfeit their right to an appeal.

Now, our position is not that this is not an appropriate sanction, that it not -- that it should not be used or that it does not have a purpose in the judicial system.

The thing that we're asking you today to decide is whether imposing that automatically rather than as a discretionary function was a proper use as it applied to Lynda Branch in this matter.

THE COURT: Don't you have to persuade us that somehow the way it was used here violates the Constitution?

MR. HENDRICKS: That's correct. Your Honor, it's my feeling several things would go into that. The first thing, there is no constitutional right to an appeal. However, once the state or once the federal system sets up an appellate procedure, then due process does apply.

Now, the primary case in this is the case of Ortega-Rodriguez, and that case basically says -- it does not actually go into due process, but it says the dismissal alone is not enough, but there must be some indication that the dismissal is reasonably imposed and connected with the appellate process.

THE COURT: But you agree that that was the Supreme Court merely exercising its supervisory power over the lower federal courts and not laying down a rule of constitutional law?

MR. HENDRICKS: I am saying that, in my opinion, that they're laying down the rule to the federal courts that they cannot automatically dismiss just because of an escape; that there has to be some showing, some prejudice shown that the escape in a way affected the appellate process. Now --

THE COURT: But the court didn't lay down a principle of constitutional law.

MR. HENDRICKS: No, they didn't. But if you go back to Judge Bartlett's decision from the district court, he in turn recognized the fact that there is due process associated.

He went in his decision that we're appealing from through a due process argument, which is -- but his

conclusion was she stated on the record that she could not accept the verdict. Therefore, because she did not show, we're saying that due process was satisfied.

My thing is, is that -- that it takes more than that; that the automatic imposition of this is not proper and it's covered under due process.

One other thing that's significant as far as Missouri's concerned, every appellate case that has been decided, with the exception of one, has quoted federal cases as justifying their escape or their -- the escape rule. If you'll look at the Kearns case, even the Branch case quoted what we call Marinaro [*sic* for 'Molinaro'], which I feel that Rodriguez Ortega overruled this.

So Missouri has always looked to the federal courts as far as justifying this rule. The decision of the district court very much addressed the fact of a due process, and this is something that's always been recognized.

If you'll look at the Ortega case, whether you take the majority or whether you take the dissent, they say that it's just not enough to have the escape, but there has to be some connection or some effect on the appellate process.

In our case, in the Branch case, you can never have a case any better. The facts are that she was sentenced or due to be sentenced on April the 3rd, that she was arrested on April the 6th, that she had her sentencing hearing on April the 10th. She was gone three days. When she did not show for --

THE COURT: She was -- she was found and arrested after three days. She might have been gone much longer.

MR. HENDRICKS: That's correct. That's correct.

THE COURT: But they were able to find her.

MR. HENDRICKS: But my point is that she also filed her notice of appeal on April the 10th. In no way can the State, whether you talk about the trial court or whether you talk about the appellate court, show in any way that the appellate procedure was affected. She was gone three days.

THE COURT: Straighten me out on this.

MR. HENDRICKS: Okay. She --

THE COURT: Let me ask you this: I don't see the usefulness perhaps in a non -- from a non-lawyer standpoint of using an escape rule where it doesn't really upset the appellate processes, but to me there's something else at stake that you need to straighten me out on.

And that is when -- maybe I'm unduly focused on this -- is that when the men got together at the Constitutional Convention to create the Constitution, the federal government wasn't there. The representatives of the states were there, and the sovereigns created this machine that we work for.

And so now you're telling us that, as you must, that state procedures are now going to be vulnerable to federal scrutiny.

MR. HENDRICKS: Certainly.

THE COURT: And so Missouri, however, doesn't rely on its rule to protect the integrity of the appellate practice. It gives some fundamental reasons for its rule. It wants its people to obey the law.

It feels that people must take responsibility for their actions, and so Missouri's got a collection of--whether they're debatable, at least they're common sense--reasons that got nothing to do with making appellate courts look good and making appellate judges have a convenient way of getting rid of appeals.

They're looking down at their people and say you've got to accept responsibility for your actions.

You've got to -- you've got to report on duty. And if you don't accept responsibility, we've got some penalties in our state. One is we just can't go for your appeal.

Now, with that kind of a basis -- and it was, incidentally, apparently Missouri's common law -- how do you get to them on a due process basis without really covering up the fact what you want the feds to do is to take charge of Missouri's operation and say they really aren't a sovereign state at all; they're just a lackey of the federal government? Missouri's just a substation of the federal government, an unincorporated territory subject to our federal supervision.

That sounds like kind of the making -- this is -- this is not a big dramatic pivotal part of that, but it's a step toward it. Now, how do we wrestle with that?

MR. HENDRICKS: Okay. The Holmes case, which basically promoted this absolute rule which was decided in the Eleventh Circuit, was very similar to what Judge Bartlett did, in other words, in this case. They just flat said that we're going to dismiss without citing any reason or any connection to the appellate process.

THE COURT: But they were just applying a federal rule. They weren't applying a state rule.

MR. HENDRICKS: That's correct. But we also recognize the fact that if the court -- Missouri does not even have to establish an appellate procedure, but when they do --

THE COURT: Well, I agree with you, that having established appellate procedures, due process applies.

MR. HENDRICKS: That's correct.

THE COURT: I agree completely.

MR. HENDRICKS: And my thing is --

THE COURT: But how do you put a due process -- I'm trying to get to you to the -- what's the due process spin? Other than just saying, well, this interferes with her appellate process -- her appellate procedures, therefore due process is violated, what's the substantive component in due process that derails Missouri's reliance on expecting people to keep their time schedules as a matter of state law, and if they don't they lose their rights?

MR. HENDRICKS: Missouri -- we're still saying Missouri can do that, but we're saying that there is a matter

of reasonableness; that due process requires them, if they're going to impose this rule, that you're going to have to show some connection with the appellate process; that that is a very drastic remedy.

THE COURT: So you're really arguing -- you're really making a substantive due process argument, a kind of fundamental right argument?

MR. HENDRICKS: That's correct. It's not a procedural, I mean according to the -- but what I'm saying, when Judge Bartlett says that when he went in and said she said that she did not -- you know, could not accept the verdict, that he should have put another standard on that which I think is mandated through the Ortega-Rodriguez case and was even mandated earlier if you'll read both the -- and the dissent recognized this, too. They says, you know, this dismissal, this sanction's okay, but we're going to have to show some type of connection.

THE COURT: But that's just a federal rule. It's not bonding on the states.

MR. HENDRICKS: I understand that, but again we're referring to what we call a due process argument. In other words, that due process would require, if they're going to impose this, that it also have some degree of reasonableness associated with it. And the reasonableness is what they discussed as having some connection with the appellate -- the appellate procedure.

In this there's no way the State can show any type of time delay, any type of -- any way that either the appellate court process was affected. We've had traditional rationales for justifying this.

THE COURT: No, but the Supreme Court has never said that the states have to do this. The Supreme Court was just dealing with a federal rule that focused on the appellate process.

MR. HENDRICKS: Correct.

THE COURT: And that all the Supreme Court said is that since we're focused on the appellate process, if you're going to cut that off you have to show that the escape somehow interfered with the appellate process.

THE COURT: I think that you'd make Judge Bowman feel better if you just acknowledge that that Supreme Court decision is not controlling in this case.

MR. HENDRICKS: But let me say --

THE COURT: Do you agree with that?

MR. HENDRICKS: No. If you --

THE COURT: You say it's controlling and by --

MR. HENDRICKS: Well, no.

THE COURT: For the reason the Supreme Court gave in that case is supervisory power.

MR. HENDRICKS: No.

THE COURT: You're asking me to apply federal supervisory powers over your state?

MR. HENDRICKS: No, I'm not. No, I'm not.

THE COURT: Well, then, how is that case absolutely controlling rather than its reasoning being persuasive?

MR. HENDRICKS: I think Ortega-Rodriguez recognized the fact that you might have different circuits within the federal system that may have different rules.

THE COURT: See, you're going to leave the podium now and I'm going to say in conference that it's your position the federal courts have supervisory powers over the State of Missouri.

MR. HENDRICKS: That is not correct. I'm not saying that.

THE COURT: Then how can this case specifically control this case because the Supreme Court said we are exercising our supervisory power as the federal Supreme Court to tell the federal district courts and the federal appellate courts how they should go about their procedural business?

THE COURT: How to apply our federal escape law.

MR. HENDRICKS: Sure.

THE COURT: I mean, I'll accept the reasoning out of that case and listen to you tell me persuasively how it controls this case, but if you're telling Judge Bowman that we must follow that case and apply supervisory power to the State of Missouri, you might lose this on a concession.

MR. HENDRICKS: I understand that. What I am saying is that whether they couch it in terms of due process or whether they couch it in terms of a reasonable connection, that the Supreme Court has said that as far as the escape rule sanction is concerned for the federal courts, that we're not going to have just an automatic imposition of this; that we're going to look beyond the --

THE COURT: But you see that reason of reasonableness is a very persuasive one going your way. What Judge Bowman is trying to point out to you and your -- by God, you've got a "by God I won't admit it" attitude, the Federal Constitution is not involved in that Supreme Court case. They did not mention constitutional law.

You, like we, will have to draw analogies and reasoning from that opinion and trans -- transplant it into a constitutional context. But you can't find a federal constitutional rule in that case -- if you can, get the opinion and read me the sentences where the Supreme Court relied on constitutional provisions for that decision.

MR. HENDRICKS: Your Honor, I'm not -- I didn't mean to --

THE COURT: Can you?

MR. HENDRICKS: No, I cannot, and I am not meaning to convey that.

THE COURT: So you're --

MR. HENDRICKS: And we've acknowledged that in our briefs.

THE COURT: You see, your case is a great case, and it brings -- because of the alternatives here that we have, and this is a classic case of one of the great legal scholars, that is Yogi Berra, who said that when you come to a fork in the road, take it. And that's where we are with this question. This is a heck of a question you've got.

MR. HENDRICKS: I understand, your Honor. And, again, I was not attempting to mislead the Court.

THE COURT: No, you're not.

MR. HENDRICKS: And I'm not --

THE COURT: You aren't at all, and I'm not -- I'm trying to get you to take these principles in this case and show how those principles will make us front and center take on the State of Missouri on a constitutional ground for which they have to answer. But on supervisory grounds, Missouri can, like anyone else, outside the constitutional federal statutory realm put their finger, their thumb on their nose and waggle their fingers, and there's nothing the federal government can do about it. That's the genius of the constitutional system.

MR. HENDRICKS: Unless they violate the Constitution of the United States.

THE COURT: Correct.

MR. HENDRICKS: And my thing is, is that due process requires what Ortega-Rodriguez said as, whether you take the majority decision or the dissent, that there has to be more than the fact that the escape happened.

THE COURT: But that's because they were connecting their reasoning to the federal rule --

MR. HENDRICKS: I understand that.

THE COURT: -- that focused on the appellate process. Missouri's rule doesn't focus on the appellate process.

THE COURT: And that's the thing. That's the thing I wanted to get at is Missouri's got its reasons founded in something other than the appellate process. Does that make a difference? That's my --

MR. HENDRICKS: It was the appellate court. In this particular case, the case was tried. When she was re-arrested, she filed her notice of appeal. Missouri went through the post-conviction remedy, in other words the post-conviction procedure. If this had been a fatal blow of saying because she was gone three days you have waived any right to an appeal, why go through the post-conviction?

THE COURT: Here's what I was getting at is, in Missouri, since it was a part of the common law, it comes from a rationale that the rule, the escape rule is based on respect for law, insistence on orderly procedure and responsibility by a litigant who wants relief from the state court system and then flaunts it rather than the rule being limited solely to the protection of appellate court jurisdiction or the enforcement of appellate rules. So when Missouri's got it reasons rooted in this in a different area than just appellate jurisdiction and enforcement of appellate orders, does that change the mix at all here from a due process basis?

MR. HENDRICKS: Missouri has relied upon the federal cases. Marinaro [*sic* for 'Molinaro'] --

THE COURT: That doesn't matter, though.

MR. HENDRICKS: But they use that as a basis. Now, you talk about the common law.

THE COURT: Missouri has never adopted the appellate -- protecting the appellate process as a basis for its escape rule. Let me put it this way. If the Missouri legislature tomorrow were to pass a statute and the governor signs it and it's the law of Missouri on the statute books that if while you're -- while you're at liberty awaiting sentencing you flee the jurisdiction or you hide or you attempt to escape, you forfeit all of your rights to appeal or to any post-conviction relief, would that be unconstitutional?

MR. HENDRICKS: No. Texas did it in the Estelle case, and there was a basis for it and they approved that under constitutional grounds. And that was a Texas death penalty case.

THE COURT: All right. Now, how is this case substantively any different from that hypothetically or from Estelle?

MR. HENDRICKS: Well, Estelle basically was the fact that the legislature had acted and whether that met the muster of due process, and that was -- that was addressing the due process argument. You could take your thing. Why would the federal court talk about the -- say that the Estelle case had to make -- pass due process muster.

Now, I'm not saying that there is -- that Ortega-Rodriguez -- now, they may sometime flatly said due process requires this, but they said we have always had a long tradition that there has to be some reasonable connection with the appellate procedure before we're going to justify this sanction. The Supreme Court even recognized that we're not laying down a flat rule and that our circuits may even vary. Some may do this, justify it on me, but we're saying that they have to have the right to have that determined. That's why they remanded the thing back in Ortega-Rodriguez because they just flat applied the Holmes rule.

Now, and that's what I'm saying that due process requires is more than just saying you lost it; that it was up to Judge Bartlett in his decision to say, yes, due process. We have given you procedural due process, and just the mere fact that you have not shown is not enough. I've got to show some connection to the appellate process which would show that either because of time, disappearance of witnesses, inconsistent results --

THE COURT: Why does the Constitution require that?

MR. HENDRICKS: Due process requires it because Missouri created --

THE COURT: That begs the question. Why does due process require that?

MR. HENDRICKS: Because when Missouri created a system of appeals for criminal cases, which maybe they did not even have to do, then they have to follow the dictates of due process.

THE COURT: But if state law says that if you escape, flee or hide you forfeit all these appeal rights, that's not unconstitutional.

MR. HENDRICKS: But that's not by statute like in the Estelle case --

THE COURT: Well, what difference does it make if the rule comes from the state courts or the legislature?

MR. HENDRICKS: It doesn't. It doesn't. But at least the state court in this situation has traditionally based its rule upon what they call the federal standard. If you will look at Kearns, at Branch where the appellate court dismissed it, they cited Marinaro [*sic* for 'Molinaro'], which was a case that -- out of disrespect for the system. That was a lead case that they cited.

Now, I know I'm not giving you a good answer, but I'm saying here the federal rules as interpreted by the federal court stand as a basis for Missouri. If it's their common law or their -- or whatever of making this decision, then this court can certainly say to Judge Bartlett that you should in your order -- other than to say she had no respect, therefore you're dismissed, that he should have had some type of finding that there was some way the appellate process was affected.

THE COURT: Let me ask you another question. Supposing we agree with you and -- the way the escape rule's been applied here and send it back and accept the -- that there is a due process ramification to taking away access to court merely by not showing up on time. What are you going to tell your next client a year and a half

down the road from now who defaulted on the timely filing of an appearance and answer in a civil case --

MR. HENDRICKS: That has nothing to --

THE COURT: -- and the Judge didn't feel that there was good cause shown because -- didn't think there was too much good cause for being in Florida rather than in St. Louis to see that your answer got filed on time? Now we've got another lack of appearance, and there's a substantive consequence here. The individual's a little excited that -- their net worth is more than a million dollars, and it's all vulnerable to execution. As a matter of due process, a state can't deprive a person merely on timeliness of -- of not defending themselves.

MR. HENDRICKS: I think Ortega addressed that when it talked about what if someone didn't file a notice of appeal on time or any other rules that the court has created. But now this dismissal rule or the felony escape rule is nowhere set out in either the statute or the court rules. It's strictly something that the courts have created as a judicial sanction.

THE COURT: Part of your state's common law, apparently.

MR. HENDRICKS: Yes.

THE COURT: Well, there's a state statute that says if a person fails to appear, they can be subject to --

MR. HENDRICKS: Sure. And this lady could have been punished by the trial court.

THE COURT: So the State has a way of punishment. And to me it comes down to a simple question, and that is, is this rule of the Missouri Supreme Court so fundamentally unfair that it violates traditional concepts of due process?

THE COURT: Now, I agree with that formulation.

THE COURT: And I think that that's a problem, and it may be that we don't all agree on whether this situation is so egregious that there is a violation of fundamental due process.

THE COURT: We're called upon to look into our consciences and decide whether we're shocked or not.

THE COURT: Exactly. And I think that that's the argument -- I think that's what Judge Fagg has been trying to get to say from the beginning and -- because I agree with him, that we can look to the reasoning of the various Supreme Court cases to see -- to help us in our conscience search. But we certainly can't take a case that was done under the supervisory authority of the Court and automatically transpose that into a constitutional rule.

MR. HENDRICKS: All I can say is this lady has got imprisonment for her natural life. Her post conviction and her --

THE COURT: That goes to -- that goes to the --

MR. HENDRICKS: The severity.

THE COURT: Of the fundamental fairness.

MR. HENDRICKS: Yes. Her post conviction and her direct appeal on this conviction was dismissed without comment. It was before the court. The transcripts were before the court. The only thing the court did, it says we're dismissing strictly upon this rule.

THE COURT: Now, if habeas relief were granted in this case, what would it consist of?

MR. HENDRICKS: One thing, it could consist of Judge Bartlett at least having to make a determination that there was some type of connection between her action and --

THE COURT: I have a lot of problems with that because it seems to me that this -- if we're looking upon this as a matter of fundamental fairness, then I think -- I don't know as -- it seems to me that we have to grapple with that problem ourselves rather than send it back to him and say is this fundamentally fair or not and then has --

THE COURT: I think that's --

MR. HENDRICKS: My thing is --

THE COURT: We have to grapple directly with that ourselves.

THE COURT: Suppose we say it's fundamentally unfair that she didn't get to pursue her appeal.

THE COURT: Right.

THE COURT: What -- how do -- what do we do? Do we say to the Missouri courts, "You've got to give her an appeal"?

MR. HENDRICKS: Yes.

THE COURT: That's all you're asking for?

MR. HENDRICKS: Yes. There's nothing other than that.

THE COURT: She doesn't get released or anything.

MR. HENDRICKS: No. And the appeal's pending. Everything's before the court.

THE COURT: Unless the statute of limitations on the state act has expired, they could proceed against her under their state statute.

MR. HENDRICKS: And you're not telling Missouri that you cannot use this rule. All you're saying is you're adopting --

THE COURT: Now, I think that's a problem because I think we'd be changing the Missouri rule because, as Judge Fagg pointed out, the Missouri rule is not based on, you know, protecting the appellate process.

THE COURT: We'd be saying that fundamental fairness to me is a concept that we always have to apply on a case-by-case basis.

MR. HENDRICKS: And again, I'm saying that it would be narrowed or you would narrow it to this case.

And again I'm saying if there was ever a good factual situation, you have a lady who, in spite of the fact that she was absent -- and this wasn't a forced escape, that she just did not appear. She was absent for three days. She filed her notice of appeal way before the time than it she would have appeared on the 3rd. There's no way the State or the courts, either court can show they were any way prejudiced or affected. Now, if she had been gone for a year or, like in Ortega, had been gone for eleven months, then you can show prejudice to the system. I mean, you -- but in this case there is no way that the State -- the only way they can justify it is that it is an affront to the dignity of the court. And the dissent has recognized this, but they said that alone is not enough. You have to show along with that some connection to the process that was affected.

THE COURT: You've had a really good exchange with us. Your client should be real pleased the way you've handled this.

MR. HENDRICKS: I'll try to remember the fork in the road next time.

THE COURT: Thank you. Mr. Simon.

MR. SIMON: Good morning, your Honor, members of the Court: my name is John Simon, and I represent the respondent in this -- in this appeal in which the petitioner seeks to expand an internal rule of the federal courts, then employ it for the first time to strike down a rule of state law, thus violating in one fell swoop most of the fundamental principles of contemporary habeas corpus jurisprudence.

Now, I want to address various points that the petitioner's counsel has very ably made this morning. He has stated that the Missouri cases enforcing the escape or fugitive dismissal rule have relied on federal authority, and we agree that many of the cases the Missouri courts have cited in escape rule or fugitive dismissal rule cases have been federal cases.

But as the Court has pointed out in respect to Ortega-Rodriguez, those federal cases were not constitutional law decisions. They were supervisory jurisdiction decisions, decisions internal to the federal jurisdiction. And, members of the Court, the State of Missouri is not trying to tell the federal courts how to handle its own criminal appeals. We're simply asking for the latitude to handle our own within the spacious limitations of the due process clause which we vigorously deny have been violated in this case.

So the fact that our courts relied on Molinaro, for example, says nothing in respect to the due process clause. That's -- that the court has ably confined this debate to one of substantive due process. Will this court decide -- will this court look at state rules of procedure and say do they -- do they -- how do they size up against the chancellor's foot? And it's our -- it's our contention that, even reading Ortega-Rodriguez for everything it's worth, the Supreme Court of the United States would not say that the enforcement of this rule in a state court in this case violates the Constitution of the United States.

Now, counsel has argued that the due process clause requires of the state courts what Ortega-Rodriguez requires of a federal court. Now, we dispute that proposition, but we understand it. Members of the Court, that would be a

new rule of law. Counsel doesn't cite any previous decisions. He doesn't decide a federal -- he doesn't cite a federal court decision that said in advance of the state court's decision in his client's case, "Thou shalt not impose the escape rule in *x*, *y*, *z* circumstances," which would include his client's.

Consequently, the prohibition of Teague against Lane on the enforcement of new rules of constitutional law for the first time in a collateral attack proceeding in federal court applies with full force to this case. And even if this court were to buy the petitioner's extreme premise, it still has to deal with why it could enforce it under Teague.

Counsel asked if the -- if the failure to appear had been a fatal blow, why did the state trial court go ahead with the post-conviction relief proceeding? And the answer, your Honor, it's in a -- in an abundance of caution and to preserve evidence so that if someone else besides the petitioner's husband were to meet an untimely doom, the -- there would be a record on which the appellate court could decide the matter if it didn't go ahead and dismiss the case under the escape rule.

And the petitioner didn't receive some drum head, slap, back of the hand treatment in this case. The Missouri Court of Appeals did not automatically dismiss the appeal. They took the State's motion to dismiss with the case. The case was briefed and orally argued. And only having gone through that process in which they could presumably have sensed whether there was any merit to the petitioner's appeal, only after having done that did they enforce the escape or fugitive dismissal rule. Now, I'm a little confused about counsel's response.

THE COURT: They certainly don't indicate that that's a part of the rationale for their decision.

MR. SIMON: No, your Honor. Nor do we rely on any specific weakness in the petitioner's underlying case for the enforcement of the escape rule. Your Honor, I'm simply trying to put what they did in perspective, and that perspective is that somebody didn't just say, "Oh, my, she failed to appear," and then that was the end of the case. It was briefed and argued, and only after that process had been gone through was there a dismissal on the basis of the escape rule. That's -- that's hardly the flip of a coin, though. It doesn't --

THE COURT: And I think he concedes that there's no procedural due process issues involved here. It's a question of substantive due process which some deny exist and others accept, or I phrase it in terms of fundamental fairness.

MR. SIMON: That's certainly -- that is the question as presented today, and it came out very clearly in petitioner's oral argument, and it's Teague barred.

Now, counsel indicated that if the legislature had enacted --

THE COURT: With respect to Teague, that's a new -- a new -- something we haven't discussed here this morning.

MR. SIMON: Yes, your Honor.

THE COURT: Do you think that Teague means that in every case in which due process is mentioned and in

which we have to look, as Judge Bowman says, within our souls to determine whether there's been a violation of fundamental fairness here, that unless we're able to find the prior case on all fours with the one we're now deciding that we have to say, "Oops, this is a first case, so we're not going to apply this rule"?

MR. SIMON: No, your Honor.

THE COURT: Because it would be -- you know, if we were -- if we were really making it more difficult for the state, if we were imposing any significant liabilities on the state, then I think the application of the Teague rule is more appropriate, but I -- I have some problems with this.

MR. SIMON: Well --

THE COURT: With imposition here.

MR. SIMON: Your Honor, if the Court were to hold for the first time that the federal -- that the contours of the federal escape or fugitive dismissal rule apply to the states, which is what I understand the petitioner's position to be, that would be a new rule, a broad new rule, that would impose a significant liability on the state because we don't know how many cases there are out there that would be subject to motions to recall the mandate or new appeals or new federal habeas corpus actions as a result of that.

THE COURT: Do you have any statistics as to whether there are any persons with situations similar to this appellant who have been denied the right to appeal because of the escape rule?

MR. SIMON: The cases that are cited in our brief -- I'm -- I'm -- your Honor, I don't have a statistical compilation from the Department of Corrections, but one will notice that many of the dates of decisions cited in both briefs are fairly recent, and I'm assuming that those people are sitting in prison now.

THE COURT: I didn't understand the rationale of Teague to be based on some kind of practical burden on the states. It's based on the idea that this is -- this is collateral federal review of a state -- of a state matter, and that we're not -- that in the course of federal habeas review we're not going to apply a brand-new rule of constitutional law in the habeas case that pronounces that new rule or that defines that new rule of constitutional law.

MR. SIMON: That would be our understanding as well, your Honor. See, the Supreme Court of the United States has said that for the federal courts this is what the rule is going to be, and I'm not here to say that that's a bad rule. It's just -- it's your rule, and it's not exactly the same as the State of Missouri's rule. And as Judge Fagg has very eloquently put it, we have a right to make some rules of our own. I don't think petitioner contends that a state court system has to take all the federal written rules --

THE COURT: You can't say that Teague -- you said Teague is your rule to us. You've forgotten something else that happened, though, after they voted at the Constitutional Convention. The federal government became the engine of all the states as well. And so when the Supreme Court of the United States has pronounced Teague, it's also your rule.

MR. SIMON: Yes, your Honor. Teague --

THE COURT: You must accept its terms as we must accept it. So there isn't them and us sort of a concept between what the Supreme Court says about the Constitution.

MR. SIMON: Oh, your Honor, and if the Supreme Court had decided Ortega-Rodriguez on the basis of the Constitution, then we would be talking about how to apply Ortega-Rodriguez.

THE COURT: Well, see, I don't believe that -- or I certainly wouldn't say that the State of Missouri must adopt the --

THE COURT: No, but they have to accept it.

THE COURT: Yeah. I don't think that the State of Missouri has to adopt -- or that this court would say that the State of Missouri must adopt the rule that is set forth in Ortega that you're applying to. It seems to me that the furthest I would be willing to go would be to say that in this case there's a lack of fundamental fairness and thus a violation of due process, and that's a time-honored concept and we're not changing law. We're not establishing any new rule. We're just applying an existing rule.

THE COURT: And here again, this isn't an altogether clear line.

MR. SIMON: Well, your Honor, as a matter or candor, I would have to add to that that there are exceptions to Teague, and one of them is the Palko versus Connecticut exception of principles fundamental to ordered liberty and whatnot. And let's say, your Honor, that this lady's appeal was not dismissed because she failed to make herself

available to the process of the court for as long as she possibly could, which in her case was only three days and she doesn't deserve any credit for that, but that instead the case had been decided on the flip of a coin, that there was a rule that the clerk of -- the clerk of the appellate court when he or she receives notice of appeal will flip a coin, and if it's heads the appeal goes forward and if it's tails the appeal is denied.

THE COURT: See, I like that.

MR. SIMON: Well, your Honor, that's not what -- now, that's what Justice Cardozo was talking about in Palko versus Connecticut. That's a good exception to Teague. But in this case this is substantive due process. This is Lochner versus New York. This is treating the states like conquered provinces, and saying: "We're going to make our own rules. We're going to have our common law of how to conduct appeals. And if you don't like it, you've got to go back to Square One and try that petitioner again."

THE COURT: I guess I wouldn't put it that way. I guess the way that I would put it is we'd simply be telling the state that you have a person who's been sentenced to life in prison and filed a notice of appeal on time. In the absence of finding that that appeal was totally frivolous that she should have an opportunity to have her case heard by the highest court in the land and determined. Now, if that was -- that would be my rationale if I were to accept it.

MR. SIMON: Your Honor, and that --

THE COURT: And I would say that Teague isn't applicable to this kind of a case when we're dealing with whether something is fundamentally fair or not.

MR. SIMON: Your Honor, because I --

THE COURT: If that were the case, we would never be able to give the first applicant for relief in a fundamental fairness case any help.

THE COURT: That's not an unattractive position, but it's hard to square that with the established principle that there is no constitutional right to an appeal. No state has to have an appeals process.

MR. SIMON: Exactly, your Honor. And the escape rule has been part of the Missouri appellate remedy. It's like a covenant running with the land. I mean, it comes with -- it comes with your right to appeal that if you escape you blow it.

THE COURT: If you can see that we may have some difficulty in whether we -- deciding whether we take the right fork or the left fork, and not in ideological....

MR. SIMON: Your Honor, while I have a couple minutes left and, if I may, I'd like to discuss a couple more of the detailed points.

Counsel has relied on the fact and indeed you, Judge Heaney, have relied on the fact that Ms. Branch could be sentenced for escape from confinement, and presumably that sentence would run consecutively -- after her natural life. She's like a capital defendant who flees. She has nothing to lose. She has nothing to fear from a consecutive sentence.

It's like Mr. Jones, who fled last week. What are we going to do, sentence him to three years after he's dead?

I mean, bury him in a different part of the cemetery? That is not a credible deterrent.

And the State is relying, members of the Court, on deterrence. We are relying -- we are saying that the courts of the State of Missouri have a right to decide (to quote someone besides Yogi Berra) that it's fine to be both loved and feared, but if you have to choose, it is better to be feared than loved. And somebody who walks away from the criminal justice system in the State of Missouri and takes the law into her own hands does not have anything to complain about when that system turns around and says, "Sorry, Charlie, this appeal is over."

And that's all that happened in this case. It's very similar to federal practice. That is instructive. The decision in Ortega-Rodriguez does not apply because it was decided under the supervisory jurisdiction of the court. Reading the opinions of all nine justices, it is difficult to find that where four justices out of the five [*sic* for 'nine'] would have made United States versus Holmes the national rule, that that violates fundamental fairness in the way it would have to be to trigger a reversal of a district judge on substantive due process grounds.

Now, counsel has said that if the legislature had adopted this rule he wouldn't have a problem with it. In Missouri, as to court rules, there is not strict separation of powers. Under Missouri Constitution, Article V, Section 5, the Missouri Supreme Court has a right to make formal written rules.

But Missouri, like the federal government, has common law. And as a matter of Missouri common law,

there's an escape rule. It has certain parameters. She fell within them. Her appeal was dismissed.

That's what the law was. She violated it. She got the consequences. There's been no violation of due process or any other federal law. The respondent respectfully prays the Court for its order that the pending appeal be denied.

Thank you, your Honor.

THE COURT: Thank you, Mr. Simon. Mr. Hendricks, we used up a lot of your time, and you probably actually got to speak your full time, but we would like to hear from you in rebuttal for at least two minutes.

MR. HENDRICKS: Your Honor, as far as the Teague case is concerned, I think that that is very much distinguishable. We're talking -- that involved a procedural bypass issue that it should have been raised at an earlier time, and I don't think -- there was no way possible that she could have raised this. She could not anticipate that this would have happened. I go back to the thing, you are correct. The states are under no obligation to even have an appellate process. But I think you have to accept the fact that when they do, then they are -- have to pass a due process muster. This is a question of fairness. This is a question -- and again, we're not asking you to tell Missouri that you cannot have an escape rule. We're not asking you to tell Missouri this, that, you know, you cannot base it on this or that. But what you're saying is under this circumstance, under this person who has suffered an extreme penalty, that when there was no connection or effect on any of the process, whether it be the trial process or the appellate process, that as a matter of fairness she is entitled to have her appeal heard. And if she's suffering

the consequences, she is entitled to this, and I would ask that this -- that this Court order her appeal to be reinstated. Thank you.

THE COURT: Thank you, Mr. Hendricks. The case submitted. Go the next case.

94-898

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRYAN GOEKE,
Superintendent, Renz Correctional Center

Petitioner,

v.

LYNDA RUTH BRANCH,

Respondent.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On March 3, 1989, the Circuit Court of Boone County convicted Lynda Ruth Branch of first-degree murder. The jury assessed her punishment as life imprisonment without eligibility for probation or parole. App. 44. Branch was released on bond and the case was set for April 3, 1989 for the disposition of her new trial motion and sentencing. Branch did not appear. App. 48-49. The trial court issued a capias warrant for Branch's arrest and it was ordered that she be held without bond. App. 53.

On April 6, 1989, Branch was arrested by law enforcement officers in Moniteau County, Missouri. She was returned to the Circuit Court of Boone County, Missouri on April 10, 1989 for sentencing. App. 76. Branch was then sentenced to life imprisonment without eligibility for probation or parole. App. 57. On April 10, 1989, the same day of the sentencing, Branch filed her Notice of Appeal. App. 3. Branch also filed a Motion for Post-Conviction Relief pursuant to Mo. S.Ct.R. 29.15. After an evidentiary hearing, the motion court denied the relief and filed Findings of Fact and Conclusions of Law on April 20, 1990. App. 62-72. This Order was entered by Judge Frank Conley who was also her trial judge. The decision on her post-conviction relief was timely appealed and consolidated with her direct appeal.

The State moved to dismiss both appeals on the basis of the escape rule. The Missouri Court of Appeals took the State's motion with the case and briefs were submitted on the merits. After oral argument, the court dismissed Branch's consolidated appeal on the fugitive escape rule. No decision was made addressing the merits of her claims. App. 76-78, 811 S.W.2d at 12. No evidentiary hearing was ever held to determine the reason for the respondent's failure to appear for sentencing. App. 18.

The Respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Missouri and raised sixteen grounds for relief. App. 84-90. In paragraph 12 a. of the petition, the respondent alleged the dismissal of the consolidated appeal denied her due process of law and equal protection of the law because (1) while she was in custody she had complied with all the statutory requirements for filing an appeal under the statutes and rules of the State of Missouri; (2) she did not escape from custody; (3) there was no prejudice to the appellate process resulting from her three day absence from April 3, 1989 to April 6, 1989; (4) the denial of the appeal denied her a fair trial because none of the issues raised in her consolidated appeal was ever addressed on the merits by an appellate court. App. 84-85.

The State's response was that the district court and other federal courts had allowed the escape rule to be applied in other circumstances. App. 97-98. The State also addressed the issue of *Teague v. Lane*, 489 U.S. 288 (1989), asking the court to state as a threshold matter whether the rule was one "implicit in the concept of ordered liberty" and should be applied retroactively. App. 99-100. The State also raised the issue that by her escape she had forfeited consideration of her other grounds for relief. App. 100-104.

The decision of the district court addressed the due process, equal protection and procedural default claims. App. 20-26. The largest portion of the opinion addressed the due process claim. The court applied the analysis of *Matthews v. Edwards*, 424 U.S. 319, 335 (1976) and held that her right to due process was not violated because her absence was not due to events beyond her control. App. 24.

The district court's judgment was made on September 23, 1992. App. 26. The district court denied respondent's motion for certificate of probable cause to appeal. The United States Court of Appeals for the Eighth Circuit granted her appeal on February 5, 1993.

The Respondent filed her brief on May 7, 1993 and presented one question on appeal:

> THE DISTRICT COURT ERRED IN DENYING THE PETITIONER'S WRIT OF HABEAS CORPUS BECAUSE THE MISSOURI COURT OF APPEALS VIOLATED HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN IT SUMMARILY DISMISSED HER CONSOLIDATED APPEALS BASED ON THE "ESCAPE RULE", IN THAT THE BLANKET APPLICATION OF THE "ESCAPE RULE" WAS ARBITRARY AND IRRATIONAL BECAUSE THE COURT FAILED TO CONSIDER THAT THE PETITIONER HAD NOT YET INITIATED THE APPELLATE PROCESS AT THE TIME OF HER ALLEGED ESCAPE, NOR DID HER ACTIONS BURDEN OR DELAY THE NORMAL APPELLATE PROCESS." App. 106.

In the State's brief filed June 18, 1993, the only responsive point was as follows:

> THE DISTRICT COURT DID NOT ERR IN REJECTING THE PETITIONER'S CONTENTION THAT THE DISMISSAL OF HER APPEAL BY THE MISSOURI COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE THE MISSOURI "ESCAPE" OR "FUGITIVE DISMISSAL" RULE -- ON ITS FACE AND AS APPLIED TO THE PETITIONER - HAS A RATIONAL BASIS

IN CRIMINAL JURIS PROCEDURE, IN THAT IT DETERS ESCAPE, FAILURES TO APPEAR, AND OTHER FUGITIVE ACTS OR OMISSIONS, AND PROMOTES THE DIGNITY, EFFICACY, AND CREDIBILITY OF THE LEGAL SYSTEM AS A WHOLE." App. 117.

The only reference to Teague principle in the brief before the Court of Appeals was "in a one-sentence footnote buried on the last page of the State's lone argument". App. 5.

On June 28, 1994, the Court of Appeals issued its first opinion in this case holding that the Due Process Clause contains a substantive component which protects individuals from government action that is arbitrary, conscience-shocking or interferes with fundamental rights and the application of the escape rule to Branch violated her due process rights based on nothing more than her failure to appear is clearly at odds with Missouri recognition that a convicted defendant's liberty should not be curtailed unless a second decision-maker was convinced the conviction was in accord with law. App. 34. A dissent was filed by Judge Bowman. App. 9.

The State filed a suggestion for rehearing en banc. On September 21, 1994, the Eighth Circuit denied rehearing en banc. Four judges would have granted rehearing. The panel issued revised majority opinion which issuing the writ and ordering the appeal to be heard. A dissenting opinion was filed. From this opinion, the State filed this petition.

ARGUMENT

I. THE COURT BELOW DID NOT DECIDE A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

The Court below decided that Lynda Branch's constitutional right to due process was violated by the Missouri Court of Appeals' dismissal of her appeal for her failure to appear for sentencing at the trial court. The Court stated this action was clearly at odds with Missouri's recognition that a convicted defendant's liberty should not be curtailed "unless a second judicial decision-maker, the Appellate Court, was convinced that the conviction was in accordance with the law." App. 9.

It appears to be the position of the Petitioner herein that because there is no constitutional obligation on the State to establish a system of appeals as of right in the first instance, it is immune from all constitutional scrutiny when it elects to implement such a system, including the mandates of due process.

At no time in the proceedings below was it ever represented that there is a constitutional mandate which dictates to the State that they must establish an appellate process and guarantee criminal defendants the opportunity to review alleged trial errors. This was rejected by this Court in *McKane v. Durston*, 153 U.S. 684 (1894), and appears to be the law today. It is the position of this respondent that once Missouri elected to establish an appellate process into Missouri's criminal justice system, the appellate procedures must comply with the Due Process Clause of the Federal Constitution's Fourteenth Amendment. This rule was established in *Evitts v. Lucey*, 469 U.S. 387, 402 (1985) when it stated:

> "In short, when a State opts to act in a field where its action has significant discretionary elements, it must none the less act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause."

This Court stated in response the argument advanced therein that there was no constitutional right to an appeal that, *Id.* at 393, "Nonetheless, if a state law has created appellate courts as" 'an integral part of the . . . system for finally adjudication the guilty or innocence of a defendant,' *Griffin v. Illinois*, 351 U.S. 12 (1956), the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clause of the Constitution."

The State of Missouri has elected to establish an appellate procedure which gives an appeal as a matter of right and dictates this appeal "shall be allowed" in all cases. Mo. Rev. Stat. §547.070 (1986). Recognizing the importance of this right in the Missouri criminal process, the Missouri Supreme Court established a rule which allows a defendant to appeal out of time within twelve months of the judgment being final. Mo. S.Ct.R. 30.03. In this case, the respondent was to appear for sentencing on April 10, 1989 before the Circuit Court of Boone County, Missouri. She did not appear and a capias warrant was issued for her arrest. She was found on April 6, 1989 and was returned to Boone County on April 10, 1989 and sentenced to a term of life imprisonment without possibility of parole. On April 10, 1989, respondent filed a Notice of Appeal to the Missouri Court of Appeals, Western District. This appeal was timely filed even if measured from the original sentencing hearing that was missed. Branch's three day absence caused no delay in the commencement of the appellate process. See Mo. S.Ct.R. 30.01(d) (notice of appeal must be filed within ten days of final judgment). A

timely motion for post-conviction relief was denied by the trial court. Both the direct and post-conviction appeals were consolidated. The merits of the case were fully briefed and orally argued. The Missouri Court of Appeals dismissed the consolidated appeals solely under the Missouri fugitive dismissal rule without addressing the merits of the case. App. 2. The question becomes was this action a violation of the respondent's Due Process rights under the Fourteenth Amendment of the Federal Constitution.

This Court must keep in mind that it is not the respondent's position that there is a fundamental right to an appeal under the Due Process Clause of the Fourteenth Amendment. It is the respondent's position that once the state established an appellate process, the appeal may not be denied in an arbitrary manner based on the established standards of due process. The respondent herein has not been afforded the opportunity to present her claims fairly in the State's appellate process. In fact, she has had not one review of any aspect of the trial court's decision. If at least an initial review by an appellate court is not an important procedural safeguard to insure a fair trial for a defendant in the criminal process, then there is no violation of Due Process. However, if this review is fundamental and essential to a fair and just proceeding, then due process will make the appeal obligatory on the State by the Fourteenth Amendment. This Court has previously recognized that there are certain safeguards which are necessary to make the appellate process fair for a criminal appellant pursuing their first appeal as of right. In *Griffin v. Illinois* 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963), the Fourteenth Amendment was held to guarantee a transcript and the right to counsel on appeal. In this case, we are addressing the appeal itself not just the minimum safeguards necessary to make the appeal adequate and effective.

The petitioner would justify the drastic step by denying the appeal on the basis that the respondent forfeited her right to appeal when she did not appear at sentencing.

This fugitive dismissal rule is thought to be needed to deter fugitive activity and to promote respect for the judicial system. In order for the dismissal to pass muster for Due Process, there must be some rational justification for a state appellate court to strip the respondent of her right to appeal. The state appellate court cannot deny the right to appeal through the arbitrary application of the fugitive dismissal rule, *Evitts*, *supra*, at 404-05; see also *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

There must be some showing that the pre-appeal flight of the respondent affected the appellate process. Even taking into consideration her three day absence, the appeal was timely filed. All procedural rules and time schedules were not altered by her absence and there is no deficiency in the perfection of her appeal. As stated in the court below, the abbreviated absence of the respondent did not have any effect on the operation or have any disrupting effect on the appellate system. App. 8. If the Court below reverses and orders a new trial, the three day absence would not have any effect on subsequent proceedings. In fact, this case has been briefed, orally argued and was in the bosom of the Missouri Courtof Appeals before dismissal on the fugitive escape rule.

It should also be noted that the respondent's absence occurred before she initiated her appellate process. There was no attempt made by the trial court to impose sanctions or to initiate criminal proceedings for failure to appear. The absence occurred while the respondent was before the trial court and the dismissal sanction was subsequently imposed by the appellate court.

It is the respondent's position that this issue was decided by the reasoning of this Court in *Ortega-Rodriguez v. United States*, 113 S.Ct. 1199 (1993). In this case, this Court addresses the issue of whether a defendant may be deemed to forfeit the right to appeal by the appellate court by fleeing while this case is pending in the district court, after being recaptured before sentencing and appeal.

In *Ortega-Rodriguez*, the Court of appeals granted the

motion to dismiss without addressing the merits of the appeal, based on the holding of *United States v. Holmes*, 680 F.2d 1372, 1373 (1982), *cert. denied*, 460 U.S. 1015 (1983). Citing *Thomas v. Arn*, 474 U.S. 140, 146-148 (1985), this Court stated the Eleventh Circuit had taken the fugitive dismissal too far and required that the dismissal represent a reasonable exercise of the court's authority. The misconduct of the defendant at the lower court level must produce the result that makes "meaningful appeal impossible" or otherwise disrupt the appellate process so that an appellate sanction is reasonably imposed. This Court required that there must be some connection between fugitivity and the appellate process and it may not rest on nothing more than the faulty presence that any act of judicial defiance, whether or not it affects the appellate process, is punishable by appellate dismissal.

In the Branch appeal, the Missouri Court of Appeals based the dismissal entirely on judicial defiance and not on any effect produced by her actions on the appellate process, *State v. Branch*, 811 S.W.2d 11, 12 (Mo. App. 1991). In all proceedings below, there was no suggestion by the State that her failure to appear for sentencing in the trial court and three day flight had any effect on appellate system. App. 8. A decision by this Court revising the decision of the court below would be in direct conflict with the recent dictates of *Ortega-Rodriguez*, *supra*. *Ortega-Rodriguez* was a review by this Court of rules of the courts of appeals under its supervisory capacity. It did not recognize a Due Process requirement binding on the states. It did establish that fugitive dismissal must represent a rational exercise of the court's authority and that there be some connection between the fugitive status and the appellate process to make the appellate sanction a reasonable response. Unless this connection is there, the sanction results in an arbitrary application of the rule. This would be contrary to the previous rules established in *Evitts*, *supra*, at 404-05 and *Daniels v. Williams*, 474 U.S. 327, 331 holding that

substantive Due Process protects individuals from arbitrary government action.

The petitioner alleges that the decision of the court below decided a federal question which conflicts with *Estelle v. Dorough*, 420 U.S. 534 (1975). First, in *Estelle*, *supra*, the defendant escaped after he was sentenced and had filed an appeal to the Texas Court of Criminal Appeals. The dismissal sanction was imposed by the appellate court during the appellate process. In this case we are addressing the situation where Branch's absence and recapture occurred before the appeal. *Ortega-Rodriguez*, *supra*, recognized and accepted the deterrence rational of *Estelle* and held it could be an appropriate sanction by which to deter. However, until the jurisdiction is vested in the appellate court, the lower court is quite capable of defending its jurisdiction due to the wide range of penalties available to the lower court and rather than the blunderbuss of dismissal, the lower court can tailor a more finely calibrated response. *Ortega-Rodriguez*, *supra*.

The opinion of the court below did not abolish the fugitive escape rule or the rule of *Estelle*. It stated there are many situations consistent with the Federal Constitution, that the court may invoke this remedy and follow the rationale of *Estelle*, *supra*, and *Molinaro v. New Jersey*, 396 U.S. 365 (1970). It did require the pre-appeal flight to adversely affect the appellate process before the court could strip the defendant of the right to appeal under the Fugitive Dismissal Rule. In *Ortega-Rodriguez*, this Court recognized the rationales which supported dismissal in cases such as *Molinaro* and *Estelle*, but that these rationales represent a reasonable exercise of the court's authority. As stated in *Ortega-Rodriguez*, *supra*, at 1208.

> Accordingly, we conclude that which a dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before the invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," *Estelle*, 420 U.S., at 542, N. 11, the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.

The decision below is not in conflict with *Reno v. Flores*, 113 S.Ct. 1439 (1993). *Flores* reaffirms that the Fifth and Fourteenth Amendments' guarantee of due process contain a substantive component which prohibits the government from a certain "fundamental" liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. It is the compelling state interest which was found to be lacking when the court below and this Court in *Ortega-Rodriguez* required a nexus between the fugitive status and the appellate process. These cases hold that there is not enough of a compelling state interest in punishing conduct which exhibits disrespect for the judicial system to simply justify dismissal when there are no other effects on the appellate process. Branch was denied her appeal in a manner which affected her right to an appeal which is a fundamental process for the protection of liberty. This action is excessive and punitive and is not rationally connected with the need to protect the dignity of the appellate court when other more appropriate remedies are available to the State.

The opinion below is not in conflict with *Bowers v. Hardwick*, 478 U.S. 186 (1986). The issue presented in *Bowers* was whether the Federal Constitution conferred a fundamental right upon homosexuals to engage in sodomy. It held that "despite the language of Due Process Clauses of the Fifth and Fourteenth Amendments, which appear to focus

only on the processes by which life, liberty, or property is taken, the cases are numerous in which those clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Any such cases are those recognizing rights that have little or not textual support in constitutional language." *Bowers*, *Id.* at 191. The Court identified the nature of the rights qualifying for heightened judicial protection as those "implicit in the concept of ordered liberty", such that neither justice nor liberty would exist if they were sacrificed. It would also protect those liberties deeply rooted in this nation's history and tradition. This Court did not feel that the right of homosexuals to engage in sodomy should be afforded the protection of Due Process under the test of *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). *Bowers* does <u>not</u> establish the principle that the scope of fundamental rights of substantive due process will not be extended beyond the subject matter of intimate conduct or family relationships.

The decision below does not hold that the Due Process Clause will forbid the courts of Missouri or any other state from invoking the fugitive escape rule. It does not hold that the rationale of *Estelle* and *Molinaro* are never to be used for the imposition of this sanction. It does hold that when the absence and recapture occur before the appellate process begins, the justifications for the appellate sanction is attenuated and often will not apply. It does stand for the principle that the fugitive status must have an impact on the appellate process sufficient to warrant an appellate sanction to survive the established mandates of due process. The decision below follows the requirements announced by this Court in *Ortega-Rodriguez* and is not in conflict with other applicable decisions of this Court.

II. THE DECISION OF THE COURT BELOW DID NOT DECIDE A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *TEAGUE V. LANE*, AND ITS PROGENY, BECAUSE THE FACTS OF THIS CASE FALL WITHIN ONE OF THE TWO EXCEPTIONS TO THE GENERAL NONRETROACTIVITY PRESUMPTION.

Assuming *arguendo* that the decision below established a new rule, then the question remains whether it comes within one of the two recognized exceptions under which a new rule is available for collateral review. In *Teague v. Lane*, 489 U.S. 346, 311, this Court recognized a second exception that a new rule may be applied on collateral review "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty"'". *Teague*, *supra*, 498 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S., at 693). Qualifying the long accepted test in *Palko v. Connecticut*, 302 *supra*, 325, this Court limited the scope of the second exceptions to those new procedural rules without which the likelihood of an accurate conviction is seriously diminished. This exception has been repeatedly acknowledged following the *Teague* decision, see *Saffle v. Parks*, 494 U.S. at 495 (1990), *Button v. McKellar*, 494 U.S., (1990) at 415; *Caspari v. Bohlen*, 114 S.Ct. 948 (1994).

The Respondent, Lynda Ruth Branch, was sentenced to life imprisonment without eligibility for probation or parole. App. 44. She filed a consolidated appeal to the Missouri Court of Appeals of both her direct appeal and the appeal of the motion court's denial of post-conviction relief. The State moved to dismiss Branch's appeal on the basis of the escape rule. Following briefing and oral argument of the consolidated appeals, the Missouri Court of Appeals dismissed both the appeals

from the conviction and the denial of the post-conviction remedy. This was done without addressing the merits of any point raised in either appeal. *State v. Branch*, *supra*, S.W.2d 11 (Mo. App. 1991).

It has been held by this Court that the second exception of *Teague* is for "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. While the exact contours of the exception may be difficult to discern, the courts generally cite *Gideon v. Wainwright*, 372 U.S. 335 (1963) to illustrate the rule that comes within this exception. *Saffle v. Parks*, 494 U.S. at 495 (1990). It is further recognized that the retroactive effect is most appropriate where the new constitutional principle is designed to enhance the accuracy of criminal trials or a decision that goes to the heart of the truth-finding function. *Salem v. Stumes*, 465 U.S. at 643, 645 (1984).

The question becomes is whether the right to have another tribunal review the rulings of the trial court, both on direct and post-conviction appeals, is necessary to preserve the fundamental fairness and accuracy of the judicial process. Lynda Branch has received life imprisonment without parole and this procedure has only been examined by a single trial judge, both as to the conviction and the post-conviction relief. The Honorable Frank C. Conley presided at the trial and decided the post-conviction motion. There is no constitutional right to have an appellate process available in a criminal proceeding. However, once the State establishes such a process, it must comply with the Due Process Clause of the Federal Constitution's Fourteenth Amendment. *Evitts v. Lucey*, *supra* at 393. Once established, to invoke the second exception of *Teague*, this Court must determine the importance of an independent review of the trial court's ruling on the accuracy and fairness of the criminal proceeding. Isn't the protection given an individual by

post-trial judicial review as important as the right to counsel established in *Gideon*? This Court has previously held to be fundamental importance the jury selection process, *Brown v. Louisiana*, 474 U.S. 323 (1980) and the safeguards on the burden of proof, *Hankerson v. North Carolina*, 432 U.S. 233 (1977). None of these fundamental rights, or other established rights, can be preserved without the checks offered by an independent review in at least one stage of the appellate process. Lynda Branch has had every decision affecting her fate made by one judge, both at the trial on the merits and at the post-conviction action. Since no one person is infallible, it would be fundamental that to ensure the procedure is fair, the case be allowed to be examined by a different court. *Douglas v. California*, 372 U.S. 353 (1963), expanded *Gideon* to require counsel to be supplied for a criminal defendant on his first appeal of right. If the availability of counsel on appeal is dictated by the standards of due process, it is hard to imagine the underlying appeal process being less important to insure the integrity of the criminal process.

The respondent has not had the opportunity to present her claims to be addressed in the context of the State of Missouri's appellate process. In early criminal proceedings, an appeal was not recognized. The State has elected to establish and commit resources for an appellate system for both criminal and civil proceedings. For this elaborate system to be created and maintained by the State, there must be some recognition that it plays an important part of our legal process. The right to one appeal is necessary to invoke and preserve the procedural and substantive safeguards that distinguish our system of justice. When the State obtains a conviction without these safeguards, a serious risk of injustice infects our procedure. The appeal is a procedure which is needed to insure the accuracy of a conviction. It is clearly within

the second exception recognized in *Teague* and subsequent decisions of this Court.

III. THE DECISION OF THE COURT BELOW DID NOT DECIDE A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *TEAGUE V. LANE*, AND ITS PROGENY, BECAUSE MISSOURI WAIVED *TEAGUE'S* NONRETROACTIVITY PRINCIPLE.

In the decision below, the court considered the threshold issue of whether the claim of the respondent was barred due to the nonretroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). The court held that if the nonretroactivity principle was applicable to Branch, it was waived by the manner in which the State responded to her appeal. Since this principle is not jurisdictional, the federal court may decline to apply the principle if the State fails to raise it. *Caspari v. Bohlen*, 114 S.Ct. 948, 953 (1994). If not properly presented, the nonretroactivity principle can be relinquished by the State. *Schiro v. Farley*, 114 S.Ct. 783, 788-89 (1994).

The Petitioner argues that the State preserved the issue throughout the proceedings below. It alleges *Teague* was asserted generally in response to the due process claim in the District Court. In spite of this "general assertion", Judge Bartlett did not address, recognize, or find the *Teague* principle depositive in his opinion dated September 23, 1992. App. 17-26. The Petitioner further claims to have cited *Teague* in its brief before the Eighth Circuit in response to the argument that *Ortega-Rodriguez* applied to the State via the due process clause. App. n. 5. This was not identified as a ground in the question presented in the appellee's brief filed before the Eighth Circuit on June 18, 1993. App. 117. It only appears as

a passing reference by footnote. App. 129.

There were four opinions issued below by the Eighth Circuit. Any of these opinions could have used the nonretroactivity principle of *Teague* as a basis rejecting the claim of the respondent. The original opinion of *Branch v. Turner*, dated June 28, 1994 (App. 27-34) issued by Judge Fogg did not cite or address the *Teague* principle. The original dissenting opinion of Judge Bowman (App. 34-41) did not address or cite *Teague*. The second dissent of Judge Bowman dated September 27, 1994 (App. 9-16) did not cite or address *Teague*. *Teague* is only addressed in the modified opinion of September 21, 1994 issued by Judge Fogg when he declined to consider the retroactive application of a new rule in violation of *Teague* because Missouri had waived the issue. Had the issue been specifically and directly presented at the district court, in the appellee's brief and at oral argument as the petitioner suggests, it appears that this defense would have received consideration from the court below. The dissent, in both opinions, did not choose to rely on *Teague* in opposition to the decision nor did it address it as an issue before the court.

The court below points out that Missouri claims to have raised *Teague* in the district court. However, *Teague* was only mentioned in a one-sentence footnote buried on the last page of the State's lone argument. It held Missouri did not mention the nonretroactivity principle or cite *Teague* in its statement of issues on appeal and did not develop the *Teague* issue in its brief. App. 5. Citing their decision in *Larson v. Nutt*, 34 F. 3d 647 (8th Cir. 1994) stating that a skeletal assertion buried in a brief point does not raise the issue on appeal.

The waiver of the *Teague* principle is not contrary to previous decisions of this Court. In *Schiro v. Farley*, 114 S.Ct. 783, 788-89 (1994), this Court, relying on *Godinez v. Morgan*, 113 S.Ct. 2680, 2685, n.8,

recognized that a state can waive a *Teague* bar by not raising it. This Court recognized that it had the discretion to reach the State's *Teague* argument, it choose not to do so in *Shiro* because it had not been properly presented to the court and the desire to decide the merits once the case had been accepted for review. In *Collins v. Youngblood*, 110 S.Ct. 2715, 2718 (1990) this Court held the *Teague* rule not to be "jurisdictional" making it mandatory that this Court raise and decide the issue *sua sponte*.

Not only has this Court recognized that *Teague's* rule can be waived, the waiver principle has been recognized in the circuits below when the issue is not properly presented. The Eighth Circuit in *Larson*, *supra*, at 648, relying on *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991), held a skeletal assertion buried in a brief point did not raise the issue on appeal. The Third Circuit in *Laborer's Intern. Union v. Foster Wheeler Energy*, 26 F.3d 375, 398 (3rd Cir. 1994) held an issue to be waived unless a party raises it in its opening brief and a passing reference to an issue will not bring the issue before the court. In *U.S. v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990), the First Circuit stated it was a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.

The decision below recognizes the settled rule that issues must be properly raised to be decided on appeal. The waiver of *Teague* below was not properly raised. This is not inconsistent with any decision of this or any court below. This Court has established that *Teague* is not jurisdictional and can be waived by the failure to raise and develop the issue and should not be considered *sua sponte*. In *Shiro*, *supra*, this Court exercised its discretion to decide the merits because this Court had accepted certiorari and once accepted, there was a need to decide the case on merits. This Court should not grant certiorari

based on the *Teague* principle because granting the writ would be contrary to the established rule that an issue must be properly presented to be reviewed. It was not presented or addressed by the court below.

CONCLUSION

The judgment of the court below is not in conflict with previous decisions of this Court. It follows the standards established by this Court in *Ortega-Rodriguez* which requires that this harsh remedy of dismissal be a reasonable exercise of the Court's authority and that the misconduct produce some disruption of the appellate process. It is clear the misconduct of the respondent had no effect on the appellate process. The decision below also follows the rule established in *Evitts*, which applies the due process standard once the State elects to establish an appellate process.

The opinion below does not abolish the fugitive dismissal rule. It recognizes that there are some circumstances where the imposition of the dismissal is an appropriate remedy to be used by the courts. However, the imposition of the dismissal rule was not appropriate in the circumstances of the respondent's appeal. Due process requires that there be some detriment be suffered to the appellate process which was not the case below. The respondent was denied her first appeal which has become a recognized and fundamental part of our criminal procedure. An appeal should not be denied on an arbitrary and irrational application of the fugitive dismissal rule. For these reasons this Court should not issue the Writ of Certiorari.

Respectfully submitted,
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SUPREME COURT OF THE UNITED STATES

BRYAN GOEKE, SUPERINTENDENT, RENZ CORRECTIONAL CENTER *v.* LYNDA RUTH BRANCH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94–898. Decided March 20, 1995

PER CURIAM.

In this case, the Eighth Circuit granted habeas relief on the ground that it is a violation of Fourteenth Amendment due process for a state appellate court to dismiss the appeal of a recaptured fugitive where there is no demonstrated adverse effect on the appellate process. The court declined to consider whether application of its ruling in respondent's case would violate the principle of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), concluding the State had waived that argument. The State raised the *Teague* bar, and application of the Eighth Circuit's novel rule violates *Teague*'s holding. For this reason, certiorari is granted and the judgment is reversed.

In 1986, a Missouri jury convicted Lynda Branch of the first-degree murder of her husband. On retrial after the Missouri Court of Appeals reversed her conviction because of an error in the admission of evidence, the jury again convicted her. Branch moved for a new trial, and the trial court scheduled a hearing for April 3, 1989, to consider this motion and to sentence her. Before the hearing, however, Branch, who was free on bail, took flight to a neighboring county. She was recaptured on April 6, 1989, and sentenced to life imprisonment without possibility of parole.

Branch filed a timely notice of appeal on direct review and an appeal of the trial court's denial of her motion

for post-conviction relief. In 1991, the Missouri Court of Appeals consolidated and dismissed the appeals under Missouri's well-established fugitive dismissal rule which provides that a defendant who attempts to escape justice after conviction forfeits her right to appeal. *State* v. *Branch*, 811 S. W. 2d 11, 12 (Mo. App. 1991) (citing *State* v. *Carter*, 98 Mo. 431, 11 S. W. 979 (1889)). "[E]ven in the absence of prejudice to the state," the court explained, "the dismissal was justified by a more fundamental principle: preservation of public respect for our system of law." 811 S. W. 2d at 12. Branch did not seek review in this Court.

On petition for federal habeas relief under 28 U. S. C. §2254, Branch alleged that the dismissal of her consolidated appeal violated due process. The District Court undertook what it termed a procedural due process analysis under the framework set forth in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), and denied relief. App. to Pet. for Cert. 17, 22–24. Branch appealed to the Court of Appeals for the Eighth Circuit, arguing she had stated a procedural due process violation. For the first time, at oral argument, the Eighth Circuit panel suggested the claim was a substantive, not a procedural due process claim. *Id.*, at 137. Branch's counsel, of course, welcomed the suggestion. On that ground, a divided panel held that dismissal of an appeal where pre-appeal flight had no adverse effect on the appellate process violated the defendant's substantive rights under the Fourteenth Amendment. After the Eighth Circuit denied the State's motion for rehearing en banc, the majority modified its opinion to explain that it would not confront the applicability of *Teague* because the State had waived the point. *Branch* v. *Turner*, 37 F. 3d 371, 374–375 (1994).

The application of *Teague* is a threshold question in a federal habeas case. *Caspari* v. *Bohlen*, 510 U. S. ___, ___ (1994) (slip op., at 4–5). Although a court need not entertain the defense if the State has not raised it, see *Schiro* v. *Farley*, 510 U. S. ___, ___ (1994) (slip op., at 6–8); *Godinez* v. *Moran*, 509 U. S. ___, ___, (1993) (slip op., at 7–8, n. 8), a court must apply it if it was raised by the State, *Caspari*, *supra*, at ___ (slip op., at 5).

The State's *Teague* argument was preserved on this record and in the record before the Court of Appeals. In the District Court, the State argued that respondent's due process claim "is barred from litigation in federal habeas corpus unless the Court could say, as a threshold matter, that it would make its new rule of law retroactive. *Teague* v. *Lane*." App. to Pet. for Cert. 99 (citation omitted). In its brief on appeal, the State pointed out that it had raised the *Teague* issue before the District Court, see *Branch*, *supra*, at 374, and argued that if the court were to decide that a constitutional rule prohibited dismissal, "such a conclusion could not be enforced in this collateral-attack proceeding consistently with the principles set forth in *Teague* v. *Lane*, and its progeny," App. to Pet. for Cert. 129, n. 5 (citation omitted). Confronted for the first time at oral argument with a substantive due process claim, the State reasserted that "the prohibition of *Teague* against *Lane* on the enforcement of new rules of constitutional law for the first time in a collateral attack proceeding in federal court applies with full force to this case." *Id.*, at 152. The next five pages of the record are devoted to the court's questions and the State's responses regarding the *Teague* issue. *Id.*, at 153–157.

This record supports the State's position that it raised the *Teague* claim. The State's efforts to alert the Eighth Circuit to the *Teague* problem provided that court with ample opportunity to make a reasoned judgment on the issue. Cf. *Webb* v. *Webb*, 451 U. S. 493, 501 (1981) (federal claim properly raised where there is "no doubt from the record that [the claim] was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim"). The State did not waive the *Teague* issue; it must be considered now; and it is dispositive. See *Caspari*, *supra*, at ___ (slip op., at 2–4); *Gilmore* v. *Taylor*, 508 U. S. ___, ___

(1993) (slip op., at 4–6).

A new rule for *Teague* purposes is one where "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Caspari*, *supra*, at ___ (slip op., at 5–6) (quoting *Teague*, 489 U. S., at 301) (emphasis deleted); *Gilmore*, *supra*, at ___ (slip op., at 2–4); *Graham* v. *Collins*, 506 U. S. ___, ___ (1993) (slip op., at 4–6). The question is "'whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Caspari*, *supra*, at ___ (slip op., at 6) (quoting *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990)).

Neither respondent nor the Eighth Circuit identifies existing precedent for the proposition that there is no substantial basis for appellate dismissal when a defendant fails to appear at sentencing, becomes a fugitive, demonstrates contempt for the legal system, and imposes significant cost and expense on the State to secure her recapture. The Eighth Circuit opined that a substantive due process violation arose from conduct that was "arbitrary," "conscience-shocking," "oppressive in a constitutional sense," or "interferes with fundamental rights," and that dismissal of Branch's appeal fell within that category. *Branch*, *supra*, at 375. These arguments are not based upon existing or well-settled authority.

Respondent and the Court of Appeals rely for the most part on *Ortega-Rodriguez* v. *United States*, 507 U. S. ___, ___ (1993). There, the Court held, as a matter of its supervisory power to administer the federal court system, that absent some adverse effect of pre-appeal flight on the appellate process, "the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal." *Id.*, at ___ (slip op., at 18). The case was decided almost two years after Branch's conviction became final. The rationale of the opinion, moreover, was limited to supervisory powers; it did not suggest that dismissal of a fugitive's appeal implicated constitutional principles. Nor was that suggestion made in any of our earlier cases discussing the fugitive dismissal rule in the federal or state courts. See *Estelle* v. *Dorrough*, 420 U. S. 534 (1975); *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970); *Allen* v. *Georgia*, 166 U. S. 138 (1897); *Bohanan* v. *Nebraska*, 125 U. S. 692 (1887); *Smith* v. *United States*, 94 U. S. 97 (1876). The *Ortega-Rodriguez* dissent reinforced this point: "There can be no argument that the fugitive dismissal rule . . . violates the Constitution because a convicted criminal has no constitutional right to an appeal." 507 U. S., at ___ (slip op., at 2) (REHNQUIST, C. J., dissenting) (citation omitted).

The Eighth Circuit did rely on *Evitts* v. *Lucey*, 469 U. S. 387 (1985), where the Court held that the Due Process Clause, guaranteeing a defendant effective assistance of counsel on his first appeal as of right, did not permit the dismissal of an appeal where the failure to comply with appellate procedure was the result of ineffective assistance of counsel. The Court did not hold, as respondent argues and the Eighth Circuit seemed to conclude, that due process requires state courts to provide for appellate review where the would-be appellant has not satisfied reasonable preconditions on her right to appeal as a result of her own conduct. *Evitts* turned on the right to effective assistance of counsel; it left intact "the States' ability to conduct appeals in accordance with reasonable procedural rules." *Id.*, at 398–399.

Branch argues that even if *Teague* does apply, the rule announced by the Eighth Circuit falls into *Teague*'s exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, *supra*, at 495 (citing *Teague*, *supra*, at 311). The new rule here is not among the "small core of rules requiring observance of those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Graham*, *supra*, at ___ (slip op., at

16–17) (some internal quotation marks omitted and citations omitted). Because due process does not require a State to provide appellate process at all, *Evitts*, *supra*, at 393; *McKane* v. *Durston*, 153 U. S. 684, 687 (1894), a former fugitive's right to appeal cannot be said to "'be so central to an accurate determination of innocence or guilt,'" *Graham*, *supra*, at ___ (slip op., at 17) (quoting *Teague*, *supra*, at 313), as to fall within this exception to the *Teague* bar.

As we explained in *Allen* v. *Georgia*, *supra*, at 140, where the Court upheld against constitutional attack the dismissal of the petition of a fugitive whose appeal was pending, "if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test." The Eighth Circuit converted a rule for the administration of the federal courts into a constitutional one. We do not (and we may not, in the face of the State's invocation of *Teague*) reach the merits of that contention. The result reached by the Court of Appeals was neither dictated nor compelled by existing precedent when Branch's conviction became final, and *Teague* prevents its application to her case. The petition for certiorari is granted and the judgment of the Court of Appeals is reversed.

It is so ordered.